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Supreme Court, U.S.
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No. (1)

IN THE
Supreme Court of the United States

DUCHESNE CITY, ET AL.,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit decided this First Amendment case in tandem with *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir.), *reh'g en banc denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-___ (U.S. Nov. 20, 2007). The Tenth Circuit denied en banc rehearing in the present case, by an equally divided 6-6 vote, in an order issued jointly in both this case and in *Pleasant Grove*. App. H. The questions presented are:

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?

2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?

3. In the alternative, if this Court first grants review in *Pleasant Grove City v. Summum*, No. 07-___ (U.S. petition for cert. filed Nov. 20, 2007), should this Court hold the present petition pending disposition of *Pleasant Grove* and then grant certiorari, vacate the decision of the Tenth Circuit, and remand for further proceedings in light of *Pleasant Grove*?

PARTIES

In addition to petitioner Duchesne City, the following parties were defendants-appellees-cross-appellants in the Tenth Circuit and are petitioners here:

Clinton Park, Mayor

Yordys Nelson, Nancy Wager, Paul Tanner, Darwin McKee, and Jeannie Mecham, City Council Members

Respondent Summum was the plaintiff-appellant-cross-appellee in the Tenth Circuit.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

DECISIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISIONS, CITY ORDINANCES, AND CITY RESOLUTION ... 3

STATEMENT OF THE CASE 4
1. Jurisdiction in District Court 4
2. Facts Material to Consideration of the Questions 4
   a. Roy Park, the Donated Monument, and the Quitclaim to the Lions Club ... 4
   b. Summum's Proposed Monument 5
   c. The Quitclaim to the Cole Daughters .. 6
3. Course of Proceedings 7
   a. District Court 7
   b. Tenth Circuit Panel 9
   c. Tenth Circuit En Banc Petition and Denial 11
   d. Tenth Circuit Mandate Stayed 16

REASONS FOR GRANTING THE WRIT 16

CONCLUSION 18

APPENDICES

A. Opinion of the U.S. Court of Appeals for the Tenth Circuit (April 17, 2007) (panel decision) 1a

B. Second Amended Opinion and Order of U.S. District Court for the District of Utah (May 23, 2005) (denying injunction and granting summary judgment in part) 1b

C. Transcript of Oral Decision of U.S. District Court for the District of Utah (Apr. 28, 2005) (granting summary judgment in part) 1c

D. Minute Entry for Oral Decision of U.S. District Court for the District of Utah (Apr. 28, 2005) (regarding oral orders of Apr. 28, 2005) 1d

E. Order of U.S. District Court for the District of Utah (May 25, 2005) (granting summary judgment in part) 1e

F. Order of the U.S. District Court for the District of Utah (Sept. 20, 2005) (award of attorney fees) 1f

G. Order of the U.S. Court of Appeals for the Tenth Circuit (Sept. 5, 2007) (staying mandate) 1g

H. Order of the U.S. Court of Appeals for the Tenth Circuit (Aug. 24, 2007) (denying rehearing and rehearing en banc) 1h

I. U.S. Const. amends. I, XIV 1i

J. Duchesne City Ordinance No. 04-2 (adopted June 29, 2004) 1j

K. Duchesne City Ordinance No. 04-4 (adopted June 29, 2004) 1k

L. Duchesne City Resolution No. 04-3 (adopted June 29, 2004) 1l

TABLE OF AUTHORITIES

Page No.

I. Cases

Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973). 4

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 US. 788 (1985) 12

Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997) . . . . . 1, *passim*

Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002) . . . . . 1, *passim*

Summum v. Pleasant Grove City, 483 F.3d 1014 (10th Cir. 2007) . . . . . 1, *passim*

United States v. Kokinda, 497 U.S. 720 (1990) . . . 12

II. Constitutions and Statutes

U.S. Const. amend. I . . . . . 3, *passim*

U.S. Const. amend. XIV 3

28 U.S.C. § 1254 (1) 3

28 U.S.C. § 1343 4

28 U.S.C. § 1367 4

42 U.S.C. § 1983 4

INTRODUCTION

This case, like the separate case of *Summum v. Pleasant Grove City*, 483 F.3d 1014 (10th Cir.), *reh'g en banc denied by an equally divided* court, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-___ (U.S. Nov. 20, 2007), was litigated in the shadow of two prior "Summum" cases decided by the Tenth Circuit. Those cases, *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), and *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), adopted the extraordinary rule that whenever a government accepts, erects, and displays a monument donated by a private entity, the government creates a speech forum for permanent monuments proffered by other private entities. Thus, in the Tenth Circuit, cities are forced either to refuse and dismantle all donated monuments, or else "brace themselves for an influx of clutter," App. 10h McConnell, J., dissenting from denial of rehearing en banc).

In the present case, the city sought to avoid this dilemma by disposing of the city's park property containing a donated monument, first by quitclaiming that plot to the local Lions Club, and then by selling the plot to members of the family who originally donated the monument. The Tenth Circuit held, as a matter of state law, that the former transaction was invalid and that the second transaction may be invalid as well. These rulings are significant precisely because the legal failure of the city to disassociate itself from the donated monument forces the city back into the federal constitutional dilemma -- either accept and display all donated permanent monuments or accept and display none -- created by the Tenth Circuit's

Summum precedents. Were those precedents to be overturned, the dilemma would disappear and with it, the legal need for the city here to dispose of the monument and its underlying plot of parkland.

The petitioners in the separate *Pleasant Grove* case seek the overruling, by this Court, of the flawed and burdensome rule of the *Summum* cases. In particular, the *Pleasant Grove* petitioners urge this Court to hold that an object owned, controlled, and displayed by the government -- be it a memorial in a park or a sculpture in a government plaza -- is **government** speech, not **private** speech, and hence there is no "speech forum for private monuments."

That portion of the Tenth Circuit's decision affirming summary judgment for Summum in the present case rests precisely upon the premise that a **government**-owned and -controlled monument in a **government** park creates a **public forum** for **private** monuments. App. 6a-8a, 10a, 13a, 17a-19a. A holding by this Court overruling that premise, either in the present case or in *Pleasant Grove,* would thus necessitate reversal of this portion of the Tenth Circuit's judgment. Moreover, overruling the *Summum* line of cases would lift the constitutional straitjacket -- imposed by the misguided *Summum* cases -- that otherwise would govern the remand proceedings under the remainder of the Tenth Circuit's decision (which reversed in part, vacated in part, and remanded). Petitioners therefore urge this Court to grant review and repudiate the Tenth Circuit's *Summum* line of cases. In the alternative -- should this Court first grant review in *Pleasant Grove* -- this Court should consider holding the present petition pending disposition of *Pleasant Grove* and then grant, vacate, and remand in

this case for further consideration in light of *Pleasant Grove*.

DECISIONS BELOW

All decisions in this case to date are entitled *Summum v. Duchesne City*. The panel opinion of the Tenth Circuit appears at 482 F.3d 1263 (10th Cir. 2007). App. A. The opinions accompanying the Tenth Circuit's denial of rehearing and rehearing en banc appear at 499 F.3d 1170 (10th Cir. 2007). App. H. The unamended decision of the district court granting summary judgment to Duchesne City in part and denying Summum's motions for summary judgment and for injunctive relief appears at 340 F. Supp. 2d 1223 (D. Utah 2004). The final, second amended version of that opinion is reproduced in the appendix. App. B. The remaining orders in this case are unpublished.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit issued its panel decision on April 17, 2007, and denied a timely petition for rehearing en banc on August 24, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, CITY ORDINANCES, AND CITY RESOLUTION

The text of the First and Fourteenth Amendments to the U.S. Constitution are set forth in Appendix I. The pertinent city ordinances and resolution are set

forth in Appendices J, K, and L.

STATEMENT OF THE CASE

1. Jurisdiction in District Court

The complaint in this case invoked 42 U.S.C. § 1983, and the district court had jurisdiction under 28 U.S.C. § 1343. The complaint also raised pendent state claims, invoking jurisdiction under 28 U.S.C. § 1367.

2. Facts Material to Consideration of the Questions

a. Roy Park, the Donated Monument, and the Quitclaim to the Lions Club

Petitioner Duchesne City is a municipality in Duchesne County, Utah. One of the municipal parks in Duchesne City is Roy Park.

In 1979, the Cole family (local residents) donated a Fraternal Order of Eagles-style[1] Ten Commandments monument to the city in memory of the deceased father of the family, Irvin Cole. That monument was erected in the northwest corner of Roy Park. (Other structures in Roy Park include a playground, benches, and a covered pavilion.)

In August of 2003, after the 1997 *Summum v. Callaghan*[2] decision was followed by the 2002 decision

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[1]The Cole family was involved with the Eagles, and the monument is essentially identical to the Eagles monuments at issue in various Establishment Clause cases, *e.g.*, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

[2]130 F.3d 906 (10th Cir. 1997).

in *Summum v. City of Ogden*,[3] both involving Utah municipalities sued by Summum to force them to install Summum's "Seven Aphorisms" monument, Duchesne City attempted to dispose of the property in Roy Park containing the monument the Cole family had donated to the city. After consulting informally with city council members and getting their assent, the mayor -- respondent Clinton Park -- executed a quitclaim deed transferring the small plot of land containing the monument to the local Lions Club, of which Mayor Park was also president.

b. Summum's Proposed Monument

Respondent Summum is a self-described "corporate sole and a church," founded in 1975, with its headquarters in Salt Lake City, Utah. Summum's founder, Summum Bonum Amon Ra, asserts that "Summa Individuals, Advanced Beings," appointed him founder and president of Summum. Answers to Defts' 1st Set of Interrogs. at 2.[4] In September and October 2003, Summum, through its president, wrote to petitioner Clinton Park, mayor of Duchesne City, requesting permission either to erect a monument in Roy Park or to be transferred a plot of land similar to that transferred to the Lions Club so as to erect Summum's monument. The Summum monument would contain the "Seven Aphorisms of Summum."

The city responded on October 27, 2003, with a

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[3]297 F.3d 995 (10th Cir. 2002).

[4]Summum identified, in the same discovery responses, the following websites (*inter alia*) as containing additional information about Summum: www.summum.us; www.summum.kids.us.

letter that Summum construed as a denial. Summum then brought suit.

c. The Quitclaim to the Cole Daughters

On June 16, 2004, while this case was in litigation, the Lions Club executed a quitclaim deed transferring the plot with the monument back to the city. On June 29, 2004, the city council then adopted two ordinances and a resolution. The first ordinance, No. 04-2 (App. J), established regulations governing the disposal of real property owned by the city. The second ordinance, No. 04-4 (App. K), "vacated" the park plot containing the monument and authorized the mayor to execute all pertinent documents. This ordinance also declared as follows:

> [T]he City never intended to, did not, and does not wish to open Roy Park or any portions thereof as a forum for the display of memorials, monuments or other donations from private individuals and organizations[.]

App. 1k. The resolution, No. 04-3 (App. L), then authorized the mayor to transfer the plot with the monument to three daughters of Irvin Cole (the Cole daughters), the man whose family had originally donated the monument to the city. The mayor then executed a quitclaim deed, dated July 13, 2004, selling the plot with the monument to the Cole daughters for $250 "and other considerations."

It is undisputed that the city, through its city council, has the power to determine which monuments (if any) will be permanently displayed on city park property. Respondent Summum does not assert that any private party has the authority to erect permanent

displays on city property. Summum does, however, dispute the validity of the quitclaim transfers both to the Lions Club and to the Cole daughters.

3. Course of Proceedings

a. District Court

Respondent Summum filed suit in the U.S. District Court for the District of Utah on November 26, 2003, against petitioners Duchesne City and its mayor and city council members. Summum alleged that the city's denial of Summum's request to erect its Seven Aphorisms monument in Roy Park, or to transfer to Summum a plot of land from that park for such a monument, violated the "free expression provision" of the First Amendment. Cplt. at 6-7, 11. The explicit basis for Summum's free speech claim was the duo of previous *Summum* decisions in the Tenth Circuit. Cplt. at 7, 10 (invoking *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002)). Summum did **not** make any claim under the Free Exercise or Establishment Clauses of the First Amendment. Summum sought damages (subsequently voluntarily capped at $20), declaratory relief, and an injunction ordering that the city "immediately allow plaintiff SUMMUM to erect its monument." Cplt. at 13-14.

Summum subsequently moved for a preliminary injunction, and all parties cross-moved for summary judgment. While the case was pending, the city, the Lions Club, and the Cole daughters, as described *supra* p. 6, took steps to regularize the city's disposal of the plot in Roy Park containing the monument.

The district court granted summary judgment (in part) to the city, denied summary judgment (in part) to Summum, and denied Summum's request for an injunction. App. B.[5] In essence, the court ruled that Duchesne's sale of the plot containing the monument to the Cole daughters successfully disassociated the city from any control over or ownership of the Ten Commandments monument. Given that there was no longer a basis to argue that the city was "sponsor[ing] private expression," App. 15b, the court rejected Summum's asserted prospective right to erect its own monument. The district court explained:

> Summum's request for its own monument to be displayed in Roy Park, either on city-owned land, or public property sold to it, would only perpetuate the City's entanglement with the sponsorship of private expression activities of private parties as defined in [*Summum v.*] *Callaghan* and [*Summum v.*] *City of Ogden*. Any solution of that nature would open the door to another display and then another, and so on, until the city park looks like a NASCAR driver at the Brickyard 400.

App. 15b. The district court did leave open, however, the possibility of awarding Summum damages for the violation of Summum's rights during the time period prior to the successful sale of the plot to the Cole daughters.

After additional briefing and a hearing, the district

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[5]The district court initially issued its written decision on October 18, 2004. (This is the version available on LEXIS.) After the parties pointed out some factual inaccuracies, the court issued an Amended Opinion and Order (Dec. 10, 2004) and a Second Amended Opinion and Order (May 20, 2005). The latter opinion is the one contained in Appendix B to this petition.

court granted summary judgment in part to Summum. App. C, D (oral ruling), E (written order). The court held that the city's attempted transfer of the plot with the monument to the Lions Club had not successfully disassociated the city from the monument, and that the city was therefore guilty of a "technical" violation of Summum's rights under the *Summum v. Callaghan* and *Summum v. City of Ogden* cases. App. 1e-2e. The court awarded Summum $20 in nominal damages. App. 2e.

The district court subsequently awarded Summum $694.40 in attorney fees. App. 5f.

Both sides filed appeals on both the merits and the attorney fees award.

b. Tenth Circuit Panel

A panel of the Tenth Circuit decided the parties' various appeals together.

On the First Amendment issue, the panel held that, under forum analysis, the relevant forum consisted of "permanent displays in Roy Park," App. 7a. The panel ruled that "it is this physical setting that defines the character of the forum," and in this case that setting was a park, "a traditional public forum." *Id.* The panel rejected the notion that the type of communication -- erecting permanent monuments -- affected the nature of the forum as "public": "The fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant to defining the forum, but it does not determine the **nature** of that forum." App. 7a n.1 (emphasis in original) (citing, *inter alia*, *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th

Cir. 2007)).

The panel then turned to the question "whether the small plot of land with the Ten Commandments monument remains part of the public forum (i.e., the city park) despite the city's efforts to sell it to a private party." App. 9a. The panel declared that the "first step . . . should be to resolve conclusively whether the property at issue is in fact privately owned," App. 12a, because "whether the property is private or public significantly affects the analysis of the property's forum status," App. 13a. In particular, "[i]f the land transfers in this case are invalid, the Ten Commandments monument is located on public property in a city park and is therefore clearly located within a public forum." *Id.* Such a conclusion would virtually assure, in the Tenth Circuit's view, that Summum would have a federal free speech right to erect its monument in Roy Park:

> In public forums, content-based exclusions (e.g., excluding Summum's Seven Aphorisms while allowing the Ten Commandments) are subject to strict scrutiny and will survive only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.

App. 8a (internal quotation marks, citation, and footnote omitted).

Turning to the question whether the city's attempts to dispose of the monument plot were valid, the panel first held that the attempted transfer to the Lions Club "was clearly invalid under state law," App. 15a. The panel therefore applied strict scrutiny, App. 17a, and found no compelling interest supporting the city's refusal to erect Summum's Seven Aphorisms

monument, App. 17a-18a. "Indeed, we have held that similar restrictions on speech may violate the First Amendment even under the less exacting standard of review applied to speech restrictions in nonpublic forums." App. 18a-19a (footnote omitted) (citing *Summum v. City of Ogden* and *Summum v. Callaghan*). "[W]e therefore conclude that Summum's free speech rights were violated prior to the property's transfer to the Cole daughters and affirm the District Court's grant of summary judgment in favor of Summum on this issue." App. 19a (footnote omitted).

The Tenth Circuit panel ruled that it could not, however, determine the validity, under state law, of the city's transfer of the plot to the Cole daughters. "[A] genuine issue of material fact exists concerning the validity of the City's transfer." App. 21a. The panel therefore reversed the district court's grant of summary judgment as to Summum's request for prospective relief and remanded for further proceedings. App. 14a, 21a, 24a.

The panel also vacated the award of attorney fees, explaining that the district court could recalculate the fee award after further proceedings on remand. App. 23a.

c. Tenth Circuit En Banc Petition and Denial

The city petitioned for rehearing en banc. The city noted that the defendants in the *Pleasant Grove* case, decided the same day and by the same Tenth Circuit panel as the present case, were simultaneously petitioning for en banc rehearing.

The city emphasized that the panel's holding that the "physical setting . . . defines the character of the

forum," App. 7a, was in direct conflict with Supreme Court cases holding that "[f]orum analysis is **not** completed merely by identifying the government property at issue," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (emphasis added), and that "[t]he mere physical characteristics of this property cannot dictate forum analysis," *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality).

On August 24, 2007, the Tenth Circuit denied en banc rehearing in both the present case and in *Pleasant Grove*, in a consolidated order, by an equally divided 6-6 vote.[6] App. H. Two judges wrote dissenting opinions, while the author of the original panel decision wrote a response to the dissents.

Judge McConnell, joined by Judge Gorsuch, faulted the panel's legal reasoning and lamented the harmful consequences of the panel decision for government-run parks:

> [The panel] hold[s] that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content -- unless their reasons for refusal rise to the level of "compelling" interests. . . . This means that Central Park in New York, which contains the

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[6]Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch, and Holmes voted for rehearing en banc. Chief Judge Tacha and Judges Kelly, Henry, Briscoe, Murphy, and Hartz voted to deny en banc review.

> privately donated Alice in Wonderland statu[]e, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

App. 10h.

> A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument -- or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

App. 11h.

Judge McConnell explained that the traditional public forum status of a park does **not** mean that "city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." App. 11h. Noting that the city did not "invite private citizens to erect monuments of their own choosing in these parks," Judge McConnell reasoned that "[i]t follows that any messages conveyed by the monuments they have chosen to display are 'government speech,' and there is no 'public forum' for uninhibited private expression." App 11h-12h. Indeed, because the city "owned" and "exercised total 'control' over the monuments," Judge McConnell explained, the city "could have removed them, destroyed them, modified them, remade them, or . . . sold them at any time. Indeed, the City of Duchesne attempted to do

just that -- sell the monument along with the plot of land on which it sits." App. 14h (citation and footnote omitted).

"Once we recognize that the monuments constitute government speech," Judge McConnell continued, "it becomes clear that the panel's forum analysis is misguided." App. 15h. "The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as . . . the Establishment Clause," Judge McConnell observed. App. 16h. "[J]ust because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing." *Id.*

Judge McConnell concluded that the panel decision is "incorrect as a matter of doctrine and troublesome as a matter of practice." App. 17h. "[T]he error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decision[] should be corrected." *Id.*

Judge Lucero, in a separate dissent, explained that a park, while a traditional public forum for many purposes, is **not** a public forum for the placement of monuments. App. 5h-7h. Judge Lucero protested that the original panel "has given an unnatural reading to the traditional public forum doctrine [which] binds the hands of local governments as they shape the permanent character of their public spaces." App. 9h. He concluded:

> The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions

> will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

Id.

Chief Judge Tacha, author of the original panel decision, took the "unprecedented step of responding to the dissents" in her own separate opinion. App. 18h. She rejected the significance of any distinction between "transitory and permanent expression" (e.g., leaflets vs. monuments) "for purposes of forum analysis," *id.*; nor, for her, did the "type of speech" (e.g., leaflets vs. monuments) matter, App. 18h-19h. Indeed, Chief Judge Tacha insisted, "the only question properly before the panel" was whether the city "could constitutionally **discriminate**" against other private speakers. App. 19h n.1 (emphasis in original). She specifically rejected the contention that this was a "government speech" case: "the appropriate inquiry is whether the government controls the content of the speech at issue, that is whether the message is a government-crafted message." App. 22h. Here, because the city had not itself prescribed the messages on the Ten Commandments monument, the city's acceptance, ownership, and control of this monument did not suffice, in her view, to make the city the speaker in the selection and placement of permanent monuments. App. 20h-22h. Finally, Chief Judge Tacha voiced concern at the prospect that a government could adopt a message on a monument without any political accountability. App. 23h, 25h-27h. She did not explain, however, why the city council in this case (or any other case) would not be as politically accountable for its acceptance and placement of a donated monument as it would be for any other city actions.

d. Tenth Circuit Mandate Stayed

On August 29, 2007, the city moved to stay the Tenth Circuit's mandate pending a petition for a writ of certiorari. On September 5, 2007, the Tenth Circuit panel stayed its mandate. App. G.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit in the present case represents yet another misstep in that circuit's faulty line of *Summum* cases. *See Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum v. Pleasant Grove City*, 483 F.3d 1014 (10th Cir.), *reh'g en banc denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-___ (U.S. Nov. 20, 2007). In each case in this series, the Tenth Circuit embraced a fundamentally flawed First Amendment analysis. First, the Tenth Circuit ruled that a message-bearing monument donated to a municipality somehow remains the private speech of the donor, not government speech, despite the government's ownership and control of the placement and retention of the monument. *Summum v. Callaghan*, 130 F.3d at 919 & n.19; *Summum v. City of Ogden*, 297 F.3d at 1003-06; *Summum v. Pleasant Grove City*, 483 F.3d at 1047 n.2. *See* App. 18a-19a. The Tenth Circuit held that this "private" speech then opens a forum for other private speech in the form of monuments proffered by other private entities. *Summum v. Callaghan*, 130 F.3d at 919 & n.19; *Summum v. City of Ogden*, 297 F.3d at 1001-02; *Summum v. Pleasant Grove City*, 483 F.3d at 1050.

See App. 8a, 17a. Further compounding its error, the Tenth Circuit held that the nature of the forum -- public vs. nonpublic -- is determined by the nature of the **underlying physical property** (e.g., a public forum park), not by the fact that a private speaker seeks access only to **install a permanent monument**. App. 7a & n.1; *Summum v. Pleasant Grove City*, 483 F.3d at 1051.

As explained in the petition for certiorari in *Pleasant Grove*, the Tenth Circuit's aberrant analysis creates multiple circuit conflicts and also runs contrary to this Court's First Amendment cases. *See* Pet. for Cert., *Pleasant Grove City v. Summum*, No. 07-___ (U.S. filed Nov. 20, 2007) § I (identifying conflict between Tenth Circuit and Second, Third, Seventh, Eighth, and D.C. Circuits on question whether government-owned, government-controlled display on government property is **government** speech, not the private speech of the display's creator; identifying conflict between Tenth Circuit and Second, Sixth, and Seventh Circuits on question whether municipal parks are public fora for private monuments or other displays); *id.* § II (describing conflict between Tenth Circuit's *Summum* precedents and this Court's jurisprudence regarding government speech doctrine and public forum doctrine). Moreover, the upshot of the flawed *Summum* analysis is the imposition of unwarranted and unreasonable burdens upon government entities (local, state, and federal). As the dissenters lamented below, the "panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them." App. 9h (Lucero, J., dissenting). "Every park in the country

that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter." App. 10h (McConnell, J., dissenting).

In the present case, the faulty line of *Summum* cases dominated Summum's complaint, the rulings of the district court, and the decision of the Tenth Circuit panel. The city tried, both before and after the onset of Summum's litigation, to dispose of the plot and monument that, under the *Summum* cases, made the city a litigation target. The Tenth Circuit panel in this case invalidated the city's first effort and called into question the city's second effort, thus pushing the city back into the dilemma those *Summum* cases create, namely, either reject all donated monuments or accept them all.

This dilemma -- and with it, the Tenth Circuit's judgment affirming summary judgment for Summum on its federal free speech claim -- disappears if the *Summum* line of cases is overturned. That is precisely what the petitioners in *Pleasant Grove* and in the present case seek from this Court. Hence, this Court should grant review. In the alternative -- in the event this Court first grants the petition in *Pleasant Grove* -- this Court should hold the present case pending *Pleasant Grove*, and then grant the petition here, vacate the decision below, and remand for further proceedings in light of *Pleasant Grove*.

CONCLUSION

This Court should either grant the petition outright, or, in the alternative -- should this Court first grant the petition *in Pleasant Grove City v. Summum*,

No. 07-___ (U.S. petition for cert. filed Nov. 20, 2007) -- this Court should hold the present petition pending disposition of *Pleasant Grove* and then grant certiorari, vacate the decision below, and remand for further proceedings in light of *Pleasant Grove*.

Respectfully submitted,

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November 21, 2007

APPENDIX A

Nos. 05-4162, 05-4168, 05-4272 & 05-4282

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church, Plaintiff-Appellant/Cross-Appellee,
v.
DUCHESNE CITY, a governmental entity; CLINTON PARK, Mayor of Duchesne City; YORDYS NELSON; NANCY WAGER; PAUL TANNER; DARWIN MCKEE; JEANNIE MECHAM, city council members, Defendants-Appellees/Cross-Appellants.

Filed April 17, 2007

OPINION

TACHA, Chief Circuit Judge.

Summum, a religious organization, filed suit under 42 U.S.C. § 1983 against Duchesne City, its mayor, and its city council members (collectively "City") for alleged violations of Summum's First Amendment free speech rights. Summum appeals the District Court's entry of summary judgment in favor of the City with respect to Summum's request for prospective injunctive relief from alleged ongoing violations of its free speech rights. The City cross-appeals the District Court's entry of summary judgment in favor of Summum with respect to Summum's request for declaratory relief and nominal damages for the City's past violations of its free speech rights. In addition, the

City cross-appeals the District Court's denial of its motion for summary judgment based on lack of standing, and both parties appeal the District Court's order awarding Summum attorneys' fees. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm in part, reverse in part, and remand.

I. BACKGROUND

This dispute arises from Summum's request to erect a monument of the Seven Aphorisms of Summum in a city park in Duchesne City, Utah. In September 2003, Summum sent a letter to the mayor of Duchesne City asking the City to transfer a small (10' x 11') plot of land in Roy Park to Summum for the display of its monument. Summum requested a plot of land (rather than simply seeking permission to erect its monument on public property) because, in August, the mayor had transferred a 10' x 11' plot of land in Roy Park containing a Ten Commandments monument to the Duchesne Lions Club. At the time of the transfer, the Ten Commandments monument had been displayed in Roy Park for nearly twenty-five years. In an attempt to remove the monument from public property, the mayor transferred the land to the Lions Club by quitclaim deed. The contract for the transaction cites the club's work in cleaning and beautifying the city as consideration for the transfer. Summum, in its request for a similar land transfer, asked that the City grant it the same access to public property that the City had granted the Lions Club. The City responded by letter, notifying Summum that it would grant Summum a similarly sized plot of land in Roy Park if the organization contributed the same amount of service to

the City as the Lions Club had contributed.

Construing the City's response as a denial of its request for a plot of land in Roy Park, Summum filed suit under 42 U.S.C. § 1983 in federal district court, alleging violations of its free speech rights under the First Amendment. It also alleged the City violated its rights under the Utah Constitution's Free Expression and Establishment Clauses. It sought declaratory and injunctive relief, as well as monetary damages. Both parties moved for summary judgment. At a hearing on the motions, the District Court expressed reservations about the City's land transfer to the Lions Club. In particular, it questioned whether the sale was supported by adequate consideration and was an arm's-length transaction (the mayor of the City was also president of the Lions Club). The court also noted that the City had not erected any fences, signs, or other indications of its disassociation from the plot of land and monument. After the court encouraged the parties to seek other solutions to the problem, the Lions Club transferred the plot of land back to the City by quitclaim deed, and the City sold the plot to the daughters of Irvin Cole, in whose honor the monument was originally donated. The Cole daughters paid $ 250 for the property, which they are free to use and dispose of as they wish. In addition, a white-picket fence approximately four feet high currently encircles the property, and a sign states that the City does not own the property. The City notified the District Court of the changed circumstances.

Summum argued that the City's sale of the property to the Cole daughters did not cure the violation of Summum's free speech rights. But in response to both parties' motions for summary

judgment, the District Court entered an order in favor of the City, finding that the second sale ended the City's association with the Ten Commandments monument. The court concluded that because the monument was now private speech on private property, Summum was not entitled to injunctive relief facilitating the display of its monument in the park. In a subsequent order, the District Court concluded that prior to the sale of the plot to the Cole daughters, the City was violating Summum's free speech rights; it therefore granted Summum's motion for declaratory relief and awarded it nominal damages of $ 20. Summum now appeals the District Court's denial of its request for injunctive relief. The City cross-appeals the District Court's decision regarding declaratory relief and damages, as well as the court's denial of the City's motion for summary judgment based on lack of standing. In addition, both parties appeal the District Court's order awarding attorneys' fees to Summum as a prevailing party under 42 U.S.C. § 1988.

II. DISCUSSION

A. Standing

Before we reach the merits of Summum's First Amendment claim, we first address the City's contention that Summum lacks standing to bring this claim. Our review of this legal question is de novo. *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006).

To ensure that an Article III case or controversy exists, a party asserting federal jurisdiction must establish three elements to have standing to bring a claim. *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150,

1155 (10th Cir. 2006); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1255 (10th Cir. 2004). First, the party must establish an injury-in-fact by showing "an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." *Utah Animal Rights Coal.*, 371 F.3d at 1255 (quotations omitted). Second, the party must demonstrate causation by "showing that the injury is fairly trace[able] to the challenged action of the defendant, rather than some third party not before the court." *Id.* (alteration in original) (quotations omitted). And third, the party must establish redressability by showing "that it is likely that a favorable court decision will redress the injury to the plaintiff." *Id.* (quotations omitted).

Summum claims that its First Amendment rights were violated when the City denied its request to erect a permanent monument in the park while allowing others to do so. The City maintains, however, that it removed the Ten Commandments monument from the park by selling the underlying property and that, consequently, a forum for permanent displays no longer exists in the park. Thus, the City argues, Summum has failed to establish an injury-in-fact. But the efficacy of the City's closure of the park as a forum for permanent displays is a matter of debate. And as we have cautioned, "we must not confuse standing with the merits." *Id.* at 1256; *see also Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) ("For purposes of the standing inquiry, the question is not whether the alleged injury rises to the level of a constitutional violation. That is the issue on the merits."). If Summum is correct that

the Ten Commandments monument is part of a public forum to which it was denied access, it may have suffered a deprivation of its free speech rights, which would clearly be an injury-in-fact caused by the City's actions and redressable by a favorable court decision. We therefore conclude that Summum has standing to bring its First Amendment claim.

B. First Amendment Claim

We review a district court's grant of summary judgment de novo, applying the same standard the district court applied. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1120 (10th Cir. 2002); *see also Jacklovich v. Simmons*, 392 F.3d 420, 425 (10th Cir. 2004) ("On cross-motions for summary judgment, our review of the summary judgment record is de novo and we must view the inferences to be drawn from affidavits, attached exhibits and depositions in the light most favorable to the party that did not prevail . . . ."). Summary judgment is proper only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, because the case before us involves First Amendment interests, "we have an obligation to conduct an independent review of the record and to examine constitutional facts and conclusions of law de novo." *First Unitarian Church*, 308 F.3d at 1120.

1. Principles of Forum Analysis

According to Summum, because the City has

permitted a private party to erect a monument in a public forum, but denied Summum's request to do the same, it has violated Summum's free speech rights. In other words, Summum claims that the City has denied it access to a public forum on the same terms it has granted to others. Hence, Summum's claim depends on whether the Ten Commandments monument continues to be part of the forum to which Summum seeks access (i.e., permanent displays in Roy Park), even though the City claims to have transferred the small plot of land containing the monument -- first to the Lions Club and then to the Cole daughters.

Before turning to the question of whether the Ten Commandments monument remains part of the park, we note that the park, in general, is a traditional public forum, and it is this physical setting that defines the character of the forum to which Summum seeks access. Streets and parks are "quintessential public forums," as they "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).[1] The

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[1]The City argues that the relevant forum is nonpublic in nature according to our decisions in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), and *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997). But in both *City of Ogden* and *Callaghan*, the property at issue could not be characterized -- by tradition or government designation -- as a public forum. *City of Ogden*, 297 F.3d at 1002 (holding that permanent monuments on the grounds of a municipal building were a nonpublic forum); *Callaghan*, 130 F.3d at 916-17 (holding that monuments on a

characterization of the forum at issue is crucial because "the extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). In public forums, content-based exclusions (e.g., excluding Summum's Seven Aphorisms while allowing the Ten Commandments) are subject to strict scrutiny and will survive "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* Alternatively, the government "may impose reasonable, content-neutral time, place, and manner restrictions" on speech in public forums (e.g., excluding all permanent displays). *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).[2]

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courthouse lawn were a nonpublic forum). Conversely, in the present case, the property is a park, the kind of property which has "immemorially been held in trust for the use of the public." *Hague*, 307 U.S. at 515. The fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum. *See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("Having identified the forum . . . we must decide whether it is nonpublic or public in nature."); *see also Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (holding that "permanent monuments in the city park" are a public forum).

[2]We note that the Supreme Court has chosen not to apply forum principles in certain contexts, recognizing that the government in particular roles has discretion to make content-based judgments in selecting what private speech to make available to the public. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs have broad discretion to consider content in

The difficult question in this case is whether the small plot of land with the Ten Commandments monument remains part of a public forum (i.e., the city park) despite the City's efforts to sell it to a private party. As a general matter, "[a] government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its public forum status." *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999) (finding that the city had sufficiently altered former public street so that it was no longer a traditional public forum). Hence, a city's sale of public property may cause it to lose its public forum status. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1255 (10th Cir. 2005) (rejecting the argument that "a public forum may never be sold to a private entity, or that if it is sold, it remains a public forum"); *see also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) ("In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use."). But

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making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may make content-based judgments in awarding grants as such judgments "are a consequence of the nature of arts funding"). The city in the case before us is not, however, acting in its capacity as librarian, television broadcaster, or arts patron. Because the Supreme Court has not extended the reasoning of these cases to the context we consider today, we conclude that the case is best resolved through the application of established forum principles.

a sale of property is not conclusive. Indeed, a First Amendment forum analysis may apply even when the government does not own the property at issue: "forum analysis does not require the existence of government property at all." *First Unitarian Church*, 308 F.3d at 1122; *see also Marsh v. State of Alabama*, 326 U.S. 501, 509 (1946) (holding that the First Amendment was violated when a corporate-owned municipality restricted individual's speech); *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 452-53 (6th Cir. 2004) (holding that privately owned sidewalk surrounding privately owned park was a public forum). Thus, even assuming the property with the Ten Commandments monument is privately owned, it may nevertheless continue to be part of the public forum and therefore subject to the strictures of the First Amendment. *See First Unitarian Church*, 308 F.3d at 1131 (holding that the city's easement over private property was a public forum).

In determining whether private property retains its status as part of a public forum, the inquiry centers on the objective, physical characteristics of the property. *Utah Gospel Mission*, 425 F.3d at 1256; *First Unitarian Church*, 308 F.3d at 1124; *see also United Church of Christ*, 383 F.3d at 452 (holding that privately owned sidewalk was public forum because it resembled public sidewalk and "blend[ed] into the urban grid"); *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001) (holding that privately owned sidewalk was a traditional public forum because it was "seamlessly connected to public sidewalks at either end and intended for general public use"). That is, a city's intentions and efforts to remove the plot of land by

transferring it to private owners do not dictate the property's status. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998); *see also First Unitarian Church*, 308 F.3d at 1124 ("The government cannot simply declare the First Amendment status of property regardless of its nature or its public use."). In addition to examining the objective, physical characteristics of private property, we have also asked whether the city is "inextricably intertwined with the ongoing operations" of the private owner or property and whether the property continues to serve the same primary function as it did before the transfer. *Utah Gospel Mission*, 425 F.3d at 1256-58; *see also First Unitarian Church*, 308 F.3d at 1128 (finding the fact that easement served same purpose as public sidewalk "a persuasive indication that the easement is a traditional public forum").

The District Court did not conduct a forum analysis to determine whether the plot of land with the Ten Commandments monument remained part of the public forum (i.e., the park) despite its sale to a private party. Instead, the court analogized the present case to the facts in *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), which involved an Establishment Clause challenge to a statue of Christ in a city park. In an effort to distance itself from religious speech, the city sold the plot of land containing the statue to a private entity. The Seventh Circuit held that the city failed to take sufficient measures to end its endorsement of religion: the "physical state of the park" was such that "a reasonable person [could] conclude that the government, rather than a private entity, *endorses* religion." *Id.* at 495 (emphasis added).

But a determination of whether the government is endorsing religion is not the same as a determination of whether speech is occurring in a public forum. The Seventh Circuit recognized this distinction in *Marshfield* when it acknowledged that, in remedying its Establishment Clause violation, the city should be mindful of the property's inclusion in a public forum: "because our holding limits private speech in a public forum, any remedy must be narrowly tailored to avoid an Establishment Clause violation." *Id.* at 497. In other words, the court recognized that a remedy ending the city's endorsement of religion would not necessarily remove the statue from the public forum, and as part of a public forum, the statue was protected speech under the Free Speech Clause of the First Amendment. To be sure, measures a city takes to differentiate private property from a public forum might affect both the private property's status as a public forum, as well as any perceived endorsement of religion, *see id.*, but the inquiry is not identical. A surrounding fence and disclaimer may be sufficient to disassociate the City from private speech for purposes of the Establishment Clause, but these measures do not necessarily remove a small parcel of property from a public forum. The District Court therefore erred in relying on *Marshfield* to support its conclusion that the sign and fence surrounding the plot of land "removed" the plot from the public forum.

In addition to its reliance on *Marshfield*, the District Court's analysis is flawed in another respect. The first step in determining whether private property is nevertheless part of a public forum should be to resolve conclusively whether the property at issue is in fact privately owned. Because the District Court

analyzed the property's status under the Establishment Clause, rather than the Free Speech Clause, it did not focus on the City's transfer of the property to the Lions Club and, later, to the Cole daughters. Instead, the District Court assumed that both sales were valid. For Establishment Clause purposes, the property's status as private or public may not significantly affect the relevant inquiry into whether a reasonable person could conclude that the government is endorsing religion. In the context of free speech, however, whether the property is private or public significantly affects the analysis of the property's forum status. If the land transfers in this case are invalid, the Ten Commandments monument is located on public property in a city park and is therefore clearly located within a public forum. Alternatively, if the City's transfers are valid, the reviewing court must determine whether the plot of land with the monument continues to be part of a public forum despite its private ownership (and the City's efforts to disassociate itself from the monument). To apply the latter analysis without first determining the validity of the land transfers could run afoul of the fundamental principle that courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 192 (2003) (quotations omitted); *see also United States v. Cusumano*, 83 F.3d 1247, 1250-51 (10th Cir. 1996) (noting that the federal courts will not resolve a constitutional question until it is unavoidable).

The District Court should therefore have analyzed the transfers for compliance with state law, rather

than assuming that both sales were valid. We therefore conduct an independent review of the record to determine whether each transfer is valid under state law. We conclude that the transfer to the Lions Club was invalid, but find the record insufficiently developed to determine whether the sale to the Cole daughters is valid and therefore remand to the District Court so that it may conduct an analysis consistent with this opinion.

2. State Law Governing the City's Transfer of Public Property

Under state law, a city's legislative body has the power to dispose of public property "for the benefit of the municipality." Utah Code Ann. § 10-8-2(1)(a)(iii). The Utah Supreme Court has interpreted this statutory provision to require that municipalities sell or otherwise dispose of public property "in good faith and for an adequate consideration." *Sears v. Ogden City*, 533 P.2d 118, 119 (Utah 1975) (holding that a city may not dispose of its property by gift), *aff'd on rehearing*, 537 P.2d 1029. The court has also held that "adequate consideration" requires the receipt of a "present benefit that reflects the fair market value" of the property. *Mun. Bldg. Auth. of Iron County v. Lowder*, 711 P.2d 273, 282 (Utah 1985); *see also Salt Lake County Comm'n v. Salt Lake County Attorney*, 985 P.2d 899, 910 (Utah 1999) (holding that adequate consideration requires a specific benefit stated in "present market value terms"). Hence, a "future" benefit will not supply adequate consideration for a city's transfer of property, "nor will a benefit that is of uncertain value." *Price Dev. Co., L.P. v. Orem City*, 995

P.2d 1237, 1247 (Utah 2000). Furthermore, Utah case law suggests that a city's disposal of park property is subject to additional limitations: "[P]roperty such as streets, alleys, parks, public buildings, and the like, although the title is in the city . . . is held in trust for strictly corporate purposes, and, as a general rule, cannot be sold or disposed of so long as it is being used for the purposes for which it was acquired." *McDonald v. Price*, 45 Utah 464, 146 P. 550, 551 (Utah 1915).

In addition to these substantive requirements, the Utah Supreme Court has held that a city's transfer of public property must be supported by documentation demonstrating the fairness of the transfer:

> [W]hen a legislative body enters into a transaction where public money or property is given in exchange for something, the good faith legislative judgment that the net exchange is for fair market value flowing to the entity needs to be supported by documentation within the legislative record of an independent determination of the value of the exchange.

Price Dev. Co., 995 P.2d at 1249. Such documentation attaches a presumption of validity to the transaction, the strength of which is "in direct proportion to the thoroughness of the evaluation of the transaction entered into and to the independence and skill of the evaluators." *Id.*

a. Transfer of the Plot to the Lions Club

The transfer from Duchesne City to the Lions Club by quitclaim deed in August 2003 was clearly invalid under state law. As an initial matter, no presumption of validity attaches to the transaction because no

documentation exists demonstrating the transaction's fairness. The City contends, however, that the properly executed and recorded quitclaim deed creates a presumption of validity. The City is correct that, under Utah law, recorded documents governing title to real property do create certain presumptions, Utah Code Ann. §§ 57-1-13; 57-4a-4, including the presumption that "any necessary consideration was given," *id.* § 57-4a-4(1)(e). But this more general statute must be interpreted in conjunction with the specific statutes and case law governing transfers of real property by municipalities. And, as noted above, a municipality's transfer of public property enjoys a presumption of validity only when supported by underlying documentation of the "independent determination of the value of the exchange." *Price Dev. Co.*, 995 P.2d at 1249.

Moreover, the presumption of a valid transaction may be rebutted by clear and convincing evidence of the transfer's invalidity. *Gold Oil Land Dev. Corp. v. Davis*, 611 P.2d 711, 712 (Utah 1980). In this case, the record contains clear and convincing evidence that the City's transfer to the Lions Club was invalid. The deed purported to transfer the parcel of property from the City to the Lions Club in return for $10 and "other considerations." The contract for sale of the property states that the transfer is "in exchange for consideration of work for the cleaning and beautification of Duchesne City." Neither document supports a conclusion that the consideration is a specific, present benefit reflecting fair market value. In addition, the same person represented entities on both sides of the transaction; Clinton Park signed the contract on behalf of the City, in his capacity as mayor,

and on behalf of the Lions Club, in his capacity as president of the local chapter. This fact raises considerable doubt that the transfer was made in "good faith." *See, e.g.*, Utah Code Ann. § 70A-1-201(19) ("'Good faith' means honesty in fact in the conduct or transaction concerned."). Because the sale to the Lions Club was not made "in good faith and for an adequate consideration," *Sears*, 533 P.2d at 119, it is invalid under state law.

Because the sale to the Lions Club was invalid, the plot of land with the Ten Commandments monument remained part of a public forum. The next question is whether the City's reasons for prohibiting Summum's speech satisfy the appropriate First Amendment standard. The City concedes it excluded Summum's speech based on its subject matter and the speaker's identity. In addition to exclusions based on viewpoint or subject matter, exclusions based on the speaker's identity trigger strict scrutiny when the forum at issue is public. *See Cornelius*, 473 U.S. at 808 (noting that exclusion of speech from a public forum requires "a finding of strict incompatibility between the nature of the speech or the identity of the speaker" and the forum's function); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression."). To survive strict scrutiny, the City must demonstrate that "the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800.

The City does not assert any compelling interest

for this restriction.[3] Rather, the City asserts that no constitutional right exists to erect a permanent structure on public property. We do not need to address that proposition in its most general application, however, because in any event it does not apply when the government allows some groups to erect permanent displays, but denies other groups the same privilege. Indeed, the cases cited by the City acknowledge this distinction. *See, e.g., Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("First Amendment jurisprudence certainly does mandate that if the government opens a public forum to allow some groups to erect communicative structures, it cannot deny equal access to others because of religious considerations . . . ."); *see also Summum v. Pleasant Grove City*, __ F.3d __ (10th Cir. 2007) (holding that a content-based exclusion of a permanent display in a public park violated the First Amendment). Indeed, we have held that similar

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[3]In its letter denying Summum's request, the City indicated it would grant Summum the same access as the Lions Club once Summum contributed the same number of service hours to the City. While we doubt the sincerity of the City's stated reason (and therefore its motive) in excluding Summum's speech, the City's denial based on lack of community service confers too much discretion on city officials to exclude speech from a public forum. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770-72 (1988). The City provided no specific guidelines for determining when a speaker has engaged in the quantity and quality of community service sufficient to gain access to the park. This kind of "unbridled discretion" is clearly unconstitutional. *Id.* at 770 ("The doctrine [forbidding unbridled discretion] requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.")

restrictions on speech may violate the First Amendment even under the less exacting standard of review applied to speech restrictions in nonpublic forums.[4] *Summum v. City of Ogden*, 297 F.3d 995, 1011 (10th Cir. 2002); *Summum v. Callaghan*, 130 F.3d 906, 921 (10th Cir. 1997). Viewing the relevant, undisputed facts in the light most favorable to the City, we therefore conclude that Summum's free speech rights were violated prior to the property's transfer to the Cole daughters and affirm the District Court's grant of summary judgment in favor of Summum on this issue.[5]

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[4]Moreover, because the Ten Commandments monument remained part of a public forum, we need not address the City's argument that the display of Summum's monument (and no other) would have caused the City to violate the Establishment Clause. But we note that, when a forum for private speech exists, we have rejected the Establishment Clause defense. *Callaghan*, 130 F.3d at 921; *see also City of Ogden*, 297 F.3d at 1011 (recommending that the city post a disclaimer if it is concerned that reasonable observers would interpret monument as a governmental endorsement of religion).

[5]The City argues that the District Court should not have granted Summum's request for declaratory relief because it had already granted the City's motion for summary judgment on Summum's entire First Amendment claim. But in its order, the court found that the City's sale to the Cole daughters cured any First Amendment violation and denied Summum's request for *prospective* relief in the form of an injunction. The court specifically noted that the order did not settle Summum's claims for money damages and attorneys' fees. This first judgment did not therefore preclude the court's subsequent entry of declaratory judgment and damages in favor of Summum for the period prior to the City's second attempt to transfer the property. Furthermore, although declaratory relief is typically prospective, "we consider declaratory relief retrospective to the extent that it

b. Transfer of the Plot to the Cole Daughters

Summum's request for prospective injunctive relief depends, in part, on the validity of the City's transfer of the property to the Cole daughters. After Clinton Park, in his capacity as president of the Lions Club, transferred the property back to the City, the city council passed ordinances governing the disposition of real property owned by the City and vacating the 10' x 11' parcel of property with the Ten Commandments monument. The council also passed a resolution authorizing the mayor to transfer the property to the Cole daughters. In July 2004, Clinton Park, as mayor, signed a quitclaim deed transferring the property to the Cole daughters for $250 "and other considerations."

The value of the exchange is apparently based on a Duchesne County tax appraisal, which lists the Duchesne Lions Club as the owner. This alone is not enough to determine whether the sale was in good faith and for adequate consideration under state law. The record lacks any supporting documentation "of an independent determination of the value of the exchange," *Price Dev. Co.*, 995 P.2d at 1249, or "a detailed showing of the benefits to be obtained" from the transfer, *Salt Lake County Comm'n*, 985 P.2d at 910. The county tax appraisal does not contain this detailed showing, as it is not intended to evaluate the City's transfer of the property to a private owner. Moreover, the record contains no discussion of whether

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is intertwined with a claim for monetary damages that requires us to declare whether a past constitutional violation occurred," *PeTA v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002), even though it is "superfluous [in this case] in light of the damages claim," *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997).

the City could dispose of park property when the property's purpose had not changed. *See McDonald*, 146 P. at 551 (noting general rule that property "held in trust for strictly corporate purposes" may not "be sold or disposed of so long as it is being used for the purposes for which it was acquired").

The District Court simply assumed the sale was valid based on the City's assertions and did not conduct an analysis of the transfer under state law. But based on our review of the record, a genuine issue of material fact exists concerning the validity of the City's transfer. We therefore reverse the District Court's grant of summary judgment in favor of the City on Summum's claim for injunctive relief. Because a determination of the sale's validity is important to a determination of the property's forum status, the District Court must first decide whether the sale meets the requirements of state law. Once this issue is decided, the court may then decide the constitutional issue of the property's forum status, applying an analysis consistent with this opinion. In addition, even if the District Court determines on remand that the land upon which the Ten Commandments monument rests is no longer part of the traditional public forum of Roy Park, Summum may still be entitled to prospective injunctive relief entitling it to place its monument on other locations that remain in the traditional public forum of Roy Park, unless the court determines that the City's ordinance purporting to close all of Roy Park to permanent displays is a valid time, place, or manner restriction under the analysis articulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989).

C. State Law Claims

Summum also claims that the District Court erred in dismissing its state law claims. In resolving the parties' motions for summary judgment the District Court did not explicitly address Summum's state law claims. Accordingly, we assume that it declined to exercise supplemental jurisdiction over those claims under 28 U.S.C. § 1367(c). *See Erikson v. Pawnee County Bd. of County Comm'rs*, 263 F.3d 1151, 1155 n.6 (10th Cir. 2001) (assuming district court declined supplemental jurisdiction when it did not address state law claims in its order of dismissal). We review a district court's decision regarding supplemental jurisdiction for abuse of discretion. *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1213 (10th Cir. 2006). In general, when federal claims are disposed of prior to trial, the district court may decline to exercise supplemental jurisdiction over state law claims and allow the plaintiff to assert those claims in state court.[6] *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995); *see also* 28 U.S.C. § 1367(c)(3) ("[A] district court[] may decline to exercise supplemental jurisdiction" over state law claims if it "has dismissed all claims over which it has original jurisdiction."). But

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[6]In fact, in *Snyder v. Murray City Corp.*, we reversed a district court's decision to exercise supplemental jurisdiction over claims involving Utah's Free Exercise and Establishment Clauses when the court had resolved the federal claims prior to trial. *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1354-55 (10th Cir. 1997) (noting that the complex nature of the law interpreting Utah's religion clauses supported dismissal of state claims), *vacated in part on rehearing en banc*, 159 F.3d 1227 (10th Cir. 1998).

because we remand Summum's federal claim for prospective injunctive relief, the District Court should reconsider whether to exercise supplemental jurisdiction over Summum's state law claims. *See Baca v. Sklar*, 398 F.3d 1210, 1222 n.4 (10th Cir. 2005) (directing the district court to reconsider its decision to decline supplemental jurisdiction after remanding a federal claim).

D. Attorneys' Fees

Both parties appeal the District Court's order awarding Summum one percent ($694.40) of the amount requested in attorneys' fees. Summum argues that it is entitled to a larger fee award, while the City argues that the court should not have awarded Summum any attorneys' fees. Because we reverse the District Court's grant of summary judgment in favor of the City with respect to injunctive relief, we vacate its order awarding attorneys' fees. The District Court may recalculate attorneys' fees after it determines whether Summum is entitled to injunctive relief in light of the foregoing discussion.

We caution, however, that to reach the conclusion that a plaintiff's victory is merely technical or de minimis -- justifying only a low fee award or no award at all -- the court must first apply the factors from Justice O'Connor's concurrence in *Farrar v. Hobby*, 506 U.S. 103, 116-22 (1992).[7] In this case, the District

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[7]These three factors are: "(1) the difference between the amount recovered and the damages sought, (2) the significance of the legal issue on which the plaintiff claims to have prevailed; and (3) the accomplishment of some public goal other than occupying the time and energy of counsel, court, and client." *Lippoldt*, 468

Court characterized the City's violation of Summum's rights as "technical" before it applied the O'Connor factors because it had only awarded Summum nominal damages. But "[n]ominal relief does not necessarily a nominal victory make." *Farrar*, 506 U.S. at 121. Accordingly, on remand, the court should apply the three O'Connor factors *before* deciding that the victory is technical and that the only reasonable fee is therefore a low fee or no fee at all. *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1230 n.3 (10th Cir. 2001); *see also Lippoldt*, 468 F.3d at 1223-24 (holding that the district court abused its discretion in finding that plaintiffs achieved only technical success without considering all the *Farrar* factors).

III. CONCLUSION

We AFFIRM the District Court's grant of summary judgment in favor of Summum with respect to declaratory relief and nominal damages, but we REVERSE its grant of summary judgment in favor of Duchesne City with respect to Summum's request for injunctive relief. In addition, we VACATE the District Court's order awarding Summum attorneys' fees and REMAND for further proceedings consistent with this opinion.

F.3d at 1222 (quotations omitted).

APPENDIX B

Case No. 2:03CV1049

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SUMMUM, a corporate sole and church
Plaintiff

v.

DUCHESNE CITY, et al.
Defendants

Filed May 23, 2005

SECOND AMENDED OPINION AND ORDER

BACKGROUND

In 1979, the Cole family of Duchesne County, Utah donated a Ten Commandments stone monolith to Duchesne City.[1] The donation was made in the name and memory of Irvin Cole, a long time resident of the community. The City placed the monolith on a 10' x 11' plot of land in Roy Park (a city park located in the center of the City) where it remained undisturbed for approximately twenty-five years. The Ten Commandments monolith has now become the object of this dispute.

On August 15, 2003, Mayor Clinton Park

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[1]Duchesne City is a small Utah community situated in the northeast quadrant of the State of Utah with a population of less than 2,000 residents.

transferred the plot of land containing the monolith to the Duchesne City Lion's Club.[2] The quit claim deed, which memorialized the transfer, noted the Lion's Club's previous, current and future services to the community as consideration for the land transfer. Three weeks after the land transfer, on September 9, 2003, Summum[3] sent a letter to Duchesne City requesting a similar plot of land as that transferred to the Lion's Club. Summum desired to place its own monument containing its seven aphorisms next to the Ten Commandments monolith, claiming its monument would be similar in size and appearance. On October 4, 2003, and October 23, 2003, Summum sent additional letters to the City, each requesting that it receive a plot of land in Roy Park similar to that transferred to the Lion's Club, and that Summum be given the same treatment as the Cole Family and be allowed to erect its monument on city property in Roy Park.

On October 27, 2003, the City responded by letter to Summum's requests. In its response the City made it clear that it would not transfer land to Summum nor would it allow Summum to erect its monument in Roy Park unless and until Summum donated equal amounts of time and service to Duchesne City

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[2]The land transfer, which will be discussed in detail below, consisted of Mayor Clinton Park transferring the parcel of land to the Lion's Club in a private transaction using a Quit Claim Deed. Mayor Park is also the president of the Lion's Club.

[3]Summum is a church. Summum claims to have 250,000 members worldwide, and is headquartered in Salt Lake City, Utah, where its founder and leader, Summum Bonum Amen Ra, resides.

equivalent to that given by the Cole Family and the Lion's Club.[4] Upon receiving the City's response, Summum filed suit on November 26, 2003, alleging violations of its First Amendment Free Speech rights and its Free Speech rights pursuant to Article I, Section 15 of the Utah Constitution. Summum also alleged a violation of the state of Utah's Establishment Clause pursuant to Article I, Section 4 of the Utah Constitution.

Shortly after filing its Complaint, Summum made a Motion for a Temporary Restraining Order and Preliminary Injunction requesting the Court to enjoin the City from giving a preference to the Cole Family and the Lion's Club to present their private viewpoints in a public forum. Both Summum and the City moved for summary judgment. The Court held a hearing on the parties' motions on January 8, 2004, at which time the Court took the motions under advisement. The Court then held a status conference on February 4, 2004, at which the Court requested supplemental briefing on, among other issues, the constitutional ramifications of allowing Summum's religious monument on public property; the ability of the Lion's Club to own real property; and, assuming the land transfer to the Lion's Club was invalid, the constitutionality of allowing the City to invalidate the land transfer to the Lion's Club and then resell the

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[4]Prior to the Fall of 2003, Summum had not established any ties to Duchesne City. There are no members of the Summum religion that reside in Duchesne City, there are no places of worship nor are there any current efforts by Summum to proselytize in Duchesne City. According to the record, Summum only became aware of the Ten Commandments monolith after receiving a telephone call from someone who knew about it.

parcel of land at public auction on the condition that the purchaser place a visible barrier of demarcation and signage on the land to distinguish between public and private land.

After receiving the supplemental briefing, the Court held a status conference on May 26, 2004, at which time the Court took the supplemental briefing and all other additional motions filed by the parties under advisement. The Court also encouraged the parties to engage in settlement discussions and set July 4, 2004 as a deadline for settlement discussions. On July 4, both parties submitted a notice to the Court outlining the actions taken in an effort to settle the dispute. The City's notification alerted the Court to the fact that it had nullified the land transaction made with the Lion's Club and had then passed numerous ordinances in an attempt to remove itself from providing a limited public forum for private speech. The City first passed ordinance 04-2, which covers the disposition of city owned real property. The City then passed ordinance 04-4 in which the city council voted unanimously to vacate and sell the portion of land in Roy Park on which the Ten Commandment monolith sits and also to permanently close Roy Park as a forum for private displays. Finally, the City passed ordinance 04-3 which authorized Mayor Clinton Park to execute a quit claim deed covering the parcel of land containing the Ten Commandments monolith in favor of Rae Donna Jones, Lou Ann Larson, and Ro Jean Rowley, the daughters of Irvin Cole. Accordingly, on July 13, 2004, the City sold the property to Ms. Jones, Ms. Larson and Ms. Rowley, for the fair market value of $250.00, based on an appraisal conducted by Duchesne County. The sisters are currently in the process of

placing a fence around the parcel of land along with a sign to demarcate the boundary between public and private land.[5]

Though the conditions and facts surrounding the Ten Commandments monolith have been modified, the parties have yet to reach a settlement. Summum maintains the position that the current arrangement remains in violation of the First Amendment's Free Speech Clause, while the City contends that the recent ownership change to the parcel of land in Roy Park cures all constitutional infirmities and makes this matter moot. The Court having considered the parties' arguments issues the following Opinion and Order.

ANALYSIS

During the latter half of the 20th Century many towns and cities in the United States accepted donations displaying the Ten Commandments.[6] These monuments were often placed by the municipalities in

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[5]According to the City's counsel at oral arguments before the Court on September 15, 2004, the plans for the property call for a fence approximately 4 feet in height with a permanent sign stating that the property is the private property of the Cole family, and is not owned or maintained by Duchesne City.

[6]*City of Elkhart v. Books*, 532 U.S. 1058 (2001); *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 358 F.3d 1020 (8th Cir. 2004); *Van Orden v. Perry*, 351 F.3d 173, (5th Cir. 2003) *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, (7th Cir. 1988); and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

city parks and near courthouses.

The acceptance of these gifts and their display appears to have been generally accepted, at least without legal challenge at the time of the donations. Over time, however, numerous lawsuits challenging the displays were filed, complaining that the displays violate the Establishment Clause of the First Amendment to the United States Constitution.[7] The outcome of these Establishment Clause challenges varied from court to court and circuit to circuit.[8] In the

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[7]*City of Elkhart v. Books*, 532 U.S. 1058 (2001); *ACLU Nebraska Foundation* v. *City of Plattsmouth, Nebraska*, 358 F.3d 1020 (8th Cir. 2004); *Van Orden v. Perry*, 351 F.3d 173, (5th Cir. 2003) *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, (7th Cir. 1988); and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

[8]The United States Supreme Court has not directly addressed the issue. However, in *City of Elkhart*, an Establishment Clause case, Justice Rehnquist, joined by Justices Scalia and Thomas, made the following observation regarding the secularity of Ten Commandment displays in his dissenting opinion:

> [W]e have never determined . . . that the Commandments lack a secular application. To be sure, the Ten Commandments are a "sacred text in the Jewish and Christian faiths," concerning, in part, "the religious duties of believers." (citations omitted) Undeniably, however, the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes. . . . "[T]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *City of Elkhart*, 121 S. Ct. at 2211 (citations omitted) (Rehnquist, J., dissenting).

Tenth Circuit Court of Appeals the issue was raised in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.1973), a case that involved the donation in 1972 of a Ten Commandments monument by the Fraternal Order of the Eagles to Salt Lake City, Utah. The City accepted the donation and chose to place the monument near the front steps of the City courthouse. In its defense to the lawsuit, the City emphasized its view that the Ten Commandments represented the foundation of the laws of the United States and the State of Utah, and for that reason they had secular significance separate and apart from any religious connotations. The Tenth Circuit agreed, finding that the predominant feature of the Ten Commandments was not religious in nature, and therefore the display did not violate the Establishment Clause of the Constitution.[9]

The Nineteen Nineties saw the emergence of a

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[9]In making its determination the Tenth Circuit focused on the secular aspect of the Ten Commandments stating:

> [A]n ecclesiastical background does not necessarily mean that the Decalogue is primarily religious in character - it also has substantial secular attributes. . . . [T]he Decalogue is at once religious and secular, as, indeed, one would expect, considering the role of religion in our traditions. After all, we are a religious people whose institutions a Supreme Being.'" *Anderson*, 475 F.2d at 33 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

After recognizing the secular nature of the Ten Commandments the Tenth Circuit determined that the monument was no more than a depiction of a historically important event with both secular and sectarian effects leading to the holding that the monument is "primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief." *Id.* at 33.

different legal challenge to Salt Lake City's Ten Commandments display, based not on the Establishment Clause of the First Amendment but rather on the Free Speech Clause of the same amendment. In *Summum v. Callaghan,* the same plaintiff as in the instant case contended that by accepting the Ten Commandments monument and displaying it on the grounds of the courthouse, the city was permitting one actor to display its private speech, and because the city was not willing to allow the plaintiff to similarly display its religious views near the courthouse steps, the plaintiff's free speech rights were being violated. *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997). The Tenth Circuit agreed, holding that the city had created a "limited public forum" and that the city was required to allow other private citizens to display their views there. Faced with this situation, the city removed the Ten Commandments monument entirely, and chose to close the area to any displays. Once the city removed the monument the case was not pursued further, and the action was dismissed.

Generally following this same rationale, although with a slightly different legal analysis, five years later the Tenth Circuit also found that the City of Ogden, Utah was similarly in violation of Summum's free speech rights in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).[10]

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[10]There, Ogden City maintained a Ten Commandments monument on the grounds of the Municipal Building. The monument was donated to the city in 1966 by the Fraternal Order of Eagles. Summum proposed that the city allow it to erect a similar monument. The City rejected Summum's proposal, which led to Summum filing a § 1983 complaint alleging violations of the

In the present case, Summum has challenged the Ten Commandments monument in Duchesne City, again basing its claim on the Free Speech Clause. As outlined above, before commencing suit Summum sought, and was denied, permission from Duchesne City to erect its own monument in Roy Park. Unlike Salt Lake City, and Ogden, and perhaps learning from their examples, Duchesne City did not respond to Summum's suit by defending its right to display the Ten Commandments monument on city property or to defend its right to have had it there in the past. Rather, the City immediately took steps to disassociate itself from the property and from the display of private expression. From the beginning of this case the City has never attempted to defend its prior actions, but it has instead attempted to properly rid itself of any association with the sponsorship of that particular expression, and to get out of the business of opening up city property to private speech by private actors.

The City's first attempt in this regard was to convey the plot of land upon which the Ten Commandments monument sits to the Duchesne Lion's Club. The city's Mayor Clinton Park took action to this effect in August of 2003, whereby he transferred the property pursuant to a Quit Claim Deed which was presented to the Lion's Club in recognition of the Club's many years of service and support to the City.

First Amendment. The Tenth Circuit held that Ogden City violated Summum's First Amendment rights by rejecting Summum's monument while displaying the Ten Commandments. The Tenth Circuit's holding prompted Ogden City to move the monument to privately owned land and to close the Municipal Building grounds to any private displays. This action by the city ended the controversy.

Summum resisted this attempt on the City's part as a proper resolution of this case, contending that the "sale" was not arms-length, that it lacked legal consideration, and that it did not sufficiently remove the City's endorsement of and involvement with the monument. It was noted by the plaintiff that there were no efforts to put up signs or other notices that would clearly state the property was no longer owned or controlled by the City.

The Court also expressed reservations about this so-called "sale" to the Lion's Club as an adequate resolution of the case, in part because the transaction appeared to lack adequate consideration and to be less than an arms-length transaction. The City's mayor was also the president of the Lion's Club, and there were virtually no efforts, such as signs, notices, or fences, to notify those who saw the monument that it was not on private property and was not sponsored by or associated with Duchesne City. Recognizing the possibility of a settlement between the parties, and in particular the City's apparent remaining desire to find an appropriate way to cease engaging in the type of free speech activity found in *Callaghan* and *City of Ogden,* the Court encouraged the parties to consider other ways of resolving the case.

Thereafter, in another effort to distance itself from the monument, the City undid the sale to the Lion's Club and instead sold the property to Rae Donna Jones, Lou Ann Larson, and Ro Jean Rowley. These women are the daughters of Irvin Cole, in whose name the Ten Commandments was originally donated to the City in 1979. According to the City, the sales price of $250.00 reflects a fair market value appraisal of the property. The transaction also includes the erection of

a fence around the property and signage which states that the property is the private property of the Cole family and is not owned by Duchesne City and that the City has nothing to do with the property or anything expressed on the property by its private owners. It is also clear the Cole daughters are free to do whatever they choose with the property, including removal of the monument.

The City's latest action is similar to a proposal advanced by the Seventh Circuit Court of Appeals in *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000). There a local group sought injunctive relief against the City of Marshfield, Wisconsin, because the city maintained a statue of Christ in a city park. To get out of the display business, the city sold the parcel of land containing the statue to the Henry Praschak Memorial Fund, Inc., for $21,560.00 ($3.30 a square foot).[11] The sale complied with all Wisconsin statutory requirements for the disposition of real property.

In resolving the case, the Seventh Circuit determined that the city's sale of its property containing the statue was not government action endorsing religion and was a reasonable method of removing itself from promoting religious speech. However, the Seventh Circuit determined that the city failed to sufficiently remove itself from the perception that the statue was still part of a public forum and therefore found a violation of the Establishment

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[11]The sale complied with all Wisconsin statutory requirements and the amount received was the highest price per square foot that the City has received for a sale of its land.

Clause.[12] The Seventh Circuit went on, however, to suggest an alternative to the City of Marshfield to eliminate the Establishment Clause problem stating:

> should the City (on City property) construct some defining structure, such as a permanent gated fence or wall, to separate City property from Fund property accompanied by a clearly visible disclaimer, on City property,(citations omitted) we doubt that a reasonable person would confuse speech made on Fund property with expressive endorsement made by the City. *City of Marshfield*, 203 F.3d at 497

Summum contends this latest effort by the City is not an adequate resolution of this lawsuit. Summum insists on being allowed its own plot of city property upon the same terms as were provided to the Ten Commandments monument donated by the Cole Family. Anything less than this remedy is not satisfactory to Summum.[13]

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[12]The language used by the 7th Circuit is as follows:
The sale transferred the statue from City ownership to private ownership, and the Fund, a purely private entity, is responsible for any expression inferred from the statue. Had the sale of the property been conducted in such a manner as to remove the impression that the statue remained part of the public forum, there would be no question that the city ended its Establishment Clause troubles. *City of Marshfield*, 203 F.3d at 496.

[13]Summum's argument is as follows:
Summum desires-equal access to the forum. Summum seeks to be treated like the Coles were before 2003, like the Lion's Club was in 2003 and 2004, and now as the Cole heirs are being treated. Defendant's maneuvering does not support free speech, the exercise of religion, nor a constitutional display of religious monuments. Rather, defendants simply support the

Considering all of the circumstances, including the lengthy history of the monument in this case, this Court agrees generally with the reasoning of the Seventh Circuit in *City of Marshfield* and finds that Duchesne City's recent efforts to disassociate itself from further involvement with the Ten Commandments monument are sufficient, with the exception of money damages to which Summum may be entitled, to render moot the present action. Duchesne City has undertaken adequate actions to make it clear that the monument sits on property that is neither owned nor controlled by the city, and that nothing on the property is in any way endorsed by or associated with Duchesne City. No reasonable person upon visiting the area could believe the city is presently sponsoring whatever expression is reflected on the plot owned by the Cole daughters. Indeed, the decision whether to continue to keep the monument on the property is solely within the discretion of the women who now own the property. They are free to use their property as they desire.

The Court's decision is based not on a determination that the City's actions necessarily constitute the best possible solution to the problem (opinions on what is "best" will in any event vary depending on one's point of view), but on whether it is a constitutionally adequate method for the City to disassociate itself from any present sponsorship of free speech activity.

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permanent display of only one set of religious ideals in a location especially created for that unconstitutional purpose. Plaintiffs Response to Defendant's Notice of "Changed Circumstances," pgs. 5-6.

There are no perfect solutions in a case of this nature with its unique history and its unique facts. It is obviously impossible for the City to undo its past involvement with the monument. For the majority of the past 25-plus years, the City apparently felt that it had properly (legally) accepted a gift from a long-term resident family and properly displayed the gift in Roy Park without violating any laws. As noted above, in 1979 it became the clearly established law in this circuit that Salt Lake City's display of a similar Ten Commandments monument did not violate the Establishment Clause. When confronted with the present lawsuit in 2004, as explained above, the City chose not to defend its prior actions, but rather to disassociate itself from them. Under all of the circumstances the method the City recently undertook is reasonable. Summum's demands for a different resolution are not warranted. It is not necessary for the City to do more than it has done to appropriately remove itself from improperly sponsoring the Ten Commandments as someone else's private speech. The City has effectively communicated to the public that it is not sponsoring the speech and has turned the matter entirely over to private actors. Complete dismantling or removal of the monument, as occurred in Salt Lake City, although also a sufficient solution, is neither required nor requested by plaintiff. Indeed, even complete removal of the monument may not satisfy this plaintiff, or any other similarly situated plaintiff. It is not beyond the realm of possibility that a plaintiff may insist that to make things right in these circumstances the plaintiff must be allowed to a) have the city accept the plaintiff's donation, b) install it in Roy Park, Duchesne City, c) for 29 years, and d) at the

end of that period, sell the plot of land to the plaintiff for fair market value, and e) then allow the plaintiff to do whatever it wants with the land and the monument. Or another plaintiff may demand something entirely different, such as removal of the present monument, and the installation of its own monument in the city park with permission to remain there for 29 years, at the conclusion of which the plaintiff's monument would be likewise removed and destroyed. Another plaintiff may not be content with any of these possibilities.

Summum's request for its own monument to be displayed in Roy Park, either on city-owned land, or public property sold to it, would only perpetuate the City's entanglement with the sponsorship of private expression activities of private parties as defined in *Callaghan* and *City of Ogden*. Any solution of that nature would open the door to another display and then another, and so on, until the city park looks like a NASCAR driver at the Brickyard 400.

Based on the Court's finding that the City's actions in removing itself from sponsorship of the Ten Commandments monument are adequate to remove the City from further sponsorship of private expression, the Court denies to plaintiff the specific injunction remedy it seeks. Plaintiff's Motion for Summary Judgment is DENIED. Defendant's Motion for Summary Judgment is GRANTED.

The only remaining issues are plaintiff's claims for money damages and attorneys fees.

IT IS SO ORDERED.

Dated this 20th day of May, 2005

By the Court

/s/_____
Dee Benson
Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

SUMMUM, a corporate sole and church,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 2:03-CV-1049DB
	)	
DUCHESNE CITY,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE DEE BENSON

April 28, 2005

Motion Hearing

[16] * * *

THE COURT: Okay. The way I see it is simply this. [17] It may be appropriate for me to ask you to do one additional brief in this case, and I apologize in advance, if that is what we end up doing. I had in the past, I think, clearly, at least I know from my point, since I am not clairvoyant, but I have found a problem in terms of the constitutional adequacy of the City of

Duchesne's efforts to get out of the business of providing a public or non-public forum, public forum, limited use public forum, whatever you want to call it, for the purpose of private actors to express themselves.

I am guided by the two decisions by the Tenth Circuit, Callaghan, which was my own case, and I know it only too well, and the City of Ogden case. Those cases laid down clear guidelines and a clear legal analysis for the free speech issue brought in those cases. It was brought by Summum in both cases, and in both cases, as we all know, the Tenth Circuit ruled in favor of Summum and found that Summum's free speech rights had been violated, regardless of the fences thrown up by the City of Salt Lake in the Callaghan case, or by the City of Ogden in the Ogden case. As we all know, there were a lot of them and there were reasons why this was not an appropriate use of government property and to accept the donation and all of that.

The Tenth Circuit said, no, what you have created in Callaghan is they find something called a limited use non-public forum or limited use public forum, I thought it was [18] limited use public forum, it was one of the two, and they championed it as a new term of art in this developing case law regarding the free speech clause, not to mention that it reversed yours truly. But they disregarded the defenses as valid legal defenses by the City of Salt Lake and said, no, under these circumstances you have violated Summum's free speech rights, and left the clear impression, I think, that if you don't do something about it, and you have got two choices, you can either give Summum an equal opportunity to display its monolith, or you can remove the one that you have got there, which is what the City

of Salt Lake did.

In Ogden the legal analysis was slightly different, but it reached the same result. You are violating Summum's free speech rights, and the City of Ogden decided to transfer the monument, as I understand it, to non-city property and away from city hall where it was located, or wherever it was displayed.

In light of those cases I would be inclined to find clearly that the City of Duchesne was in violation of Summum's free speech rights right up until it transferred the property to the Lion's Club. Clearly, I guess on that we would all have to agree. If Summum had made its request for a marker similar to the way they made it in Salt Lake, and similar to the way they made it in Ogden, and the city tried to defend itself by saying we have every right to have this monument here [19] and it is not violating your free speech rights, they would have lost.

When this case came to me we were in the interesting situation where the city had already done something to attempt to get the monument off of public property and get it onto private property with a private actor owning the property and entitled to do whatever it wanted to do with what was formerly public property.

I was inclined, as I said in my written opinion, to agree generally with the reasoning with the City of Marshfield case out of the Seventh Circuit. In that case the issue was not free speech, and that I think is important to note. It was not free speech, it was whether the establishment clause was being violated by a statute of Jesus Christ in a city park. The Seventh Circuit held that an effort on the city's part, as you know, to transfer that to a private owner was not

enough to eliminate the establishment clause violation. They did, however, in dictum in their opinion state that if there had been enough signage around the monument and enough demarcation so that no reasonable observer would believe that the statute still sat on public property or was endorsed by the city, then it would be an appropriate way for the city to stop violating this establishment clause. That later happened. I believe that was the end of the case.

In this case I suggested, in my efforts to get this [20] settled, that the city had problems with its current situation, in which the land transfer was only between the mayor and himself wearing two different hats, and where there was some issue as to whether it was a valid state transfer, in any event.

Thirdly, that there was some issue as to whether there was sufficient consideration paid. Fourthly, and probably most important from my standpoint, is that there were no apparent efforts taken to tell a reasonable passerby, a reasonable observer, that the city was not an endorser of and participant in this display. There was no signage. There was no fence. There was no flashing neon sign saying this is the property of the Lion's Club in Duchesne City, and the City of Duchesne has no involvement or anything of that nature.

I tried to suggest that maybe this can go away because it looks like the city has already started down this road. I'm suggesting they have not gone far enough. And then when the city did go the next step, I found that it was far enough. So the issue as to whether Mr. Barnard's client has prevailed centers solely on whether Summum's free speech rights were violated during the time that the conditions existed

where the city had transferred the property to the Lion's Club. I see a possible distinction between the establishment clause, which is a different kind of right than a free speech right. A free speech right gives the free speech right to a citizen to [21] exercise freedom of expression. The establishment class prevents the government from doing anything to establish a certain religion. In the City of Marshfield it was the establishment clause. So once they had taken enough steps to get out of the business of establishment, they are no longer in violation of the establishment clause. But right up until they did that in the City of Marshfield case, the Seventh Circuit held that they were in violation of the establishment clause.

Whether that same holding would be applicable in this free speech case, I'm not so sure. Here Summum comes in when the city, it appears to me from the facts that are undisputed, was making attempts to rid itself of this monument. I found in my written opinion that it was not constitutionally adequate for me not to consider granting some kind of injunctive relief. But I'm not, as I say that, satisfied, and as I sit here and I have read especially Mr. White's and Mr. Manion's motion for summary judgment, and it seems to touch on this, but they also seem to maybe be rearguing Callaghan and the City of Ogden which we can't do. They seem to think that ownership alone is the key to whether a city is involved with an improper private expression opportunity. I don't think so. I think the question is whether the city is endorsing it or being involved with it to the point that another private actor should be entitled to the same opportunity. That was clearly the case in Callaghan and City of Ogden because one private actor was being [22] given that

opportunity. The Tenth Circuit certainly didn't say, well, because the City of Salt Lake saw a distinction between Summum and the Fraternal Order of Eagles which gave us the Ten Commandments monolith, then it is okay. It is just a different actor. That wasn't their analysis.

If I do get further briefing, it needs to be focused clearly on the binding precedents before this Court which is Callaghan and City of Ogden. The defendants would be obligated to point out to me why when the Lion's Club situation was in place it was not a violation of Summum's free speech rights. And the reason that presents practical possibilities in my mind is because, as a practical matter, what exactly was it that Summum was being robbed of in that particular scenario? Did they rally think the city would say, oh, because we have not maybe distanced ourselves far enough to satisfy Judge Benson in his analysis of possibly exercising his equitable powers, that we are at the same time violating Summum's free speech rights when we are doing everything that we can, and maybe it is as good or not as it could be done, but to get out of this business. So Summum comes along at a time when conceptually it may be difficult to say that their free speech rights were being violated.

But, on the other hand, if you take Callaghan and the City of Ogden and match them up against the situation, and which I am on record as saying there was not a sufficient [23] distancing to satisfy my view of what the constitution would require for a permanent solution, and that was based, as I said earlier, on this simple test, that would a reasonable person passing by that parcel believe the city was endorsing that private speech? In looking at it that way, Mr. Barnard wins

and it is maybe a technical prevailing but it is prevailing. Free speech rights were violated, no matter how nominally and no matter how technically. I believe it is fair to say that that is where I have been in the past, having not really contemplated the difference between the establishment clause and the free speech clause.

I have talked way too long, but I can say that with the present briefing I feel that that issue has been sufficiently brought to a head to where I feel comfortable in ruling. I'll invite any comments you all want to make.

By the way, one other thing. I want to emphasize that point about nominal. I am extremely inclined to find only nominal damages, if I do find in Mr. Barnard's favor, a very technical and very narrow window violation of Summum's rights. They didn't get involved until after the property had been transferred to the Lion's Club. I am inclined at the present time to exercise my discretion with respect to the award of attorney's fees consistent with recognizing that it is not just nominal in the sense of one dollar or twenty dollars, but that it does not carry also with it the entitlement to receive a [24] great measure of attorney's fees. I say that in an effort that it might help you to sit down and settle this.

I think if I'm going to rule on that question that is mixed up in your other pending motion, and I think you're very good lawyers, and I am especially probably moved by the fact that I have Mr. White and Mr. Manion on the other side, and they have briefed it so much more thoroughly than you have at this point, I think, but I don't know that they have hit on all the right points. I think I'm going to ask for more briefing

unless you talk me out of it. Mr. Barnard is always pretty good in doing that. He has a better track record than about any lawyer that appears before me of talking me out of things.

* * *

[33]* * *

THE COURT: Well, I am not going to ask for further briefing. I guess Mr. Barnard did talk me out of it. The reason I guess I'm not agreeing with Mr. White is because I find Callaghan and the City of Ogden controlling, and based on those cases, find a violation of Summum's free speech rights during that narrow period of time that the city attempted to get out of the business of sponsoring a private actor's free speech opportunity when it sold the property to the Lion's Club. Because the plaintiff has not proven to me by a preponderance of the evidence that there was no sale, I can't find that there was anything but a sale. The reason I'm finding Callaghan and the City of Ogden controlling is because [34] of my previous order, and the Court's position still is that the city did not do enough to remove the city's imprimatur on that parcel of land. Simply recording a quitclaim deed in the city recorder's office in this Court's view was not enough. It is a little like an alter ego theory, to borrow a legal analogy, where somebody is facing chapter seven bankruptcy and puts his car in his wife's name. There are a lot of times when legal ownership may have validly transferred, but it does not mean that there still won't be repercussions that flow from the fact that it was not transferred as validly as it should have been, which was the reason for this Court's staying with this case as long as it did.

I thought there may be a distinction between the

City of Marshfield and this case. As I sit here I am not sure, and frankly I don't think it is worth it. This case is not going to have precedents for very many situations, unless you have a city routinely with the mayor being also the president of the Lion's Club and in an effort to get out of the Ten Commandant site on city property doing a quitclaim deed and nothing else, no signage, no public announcement or anything else.

I suppose pragmatism is entering in here. I am granting Mr. Barnard's motion for declaratory relief and finding nominal damages in the amount prayed for of $20. That leaves open the question of attorney's fees. I guess I need briefing on that.

[35] You have not finalized that motion, have you?

MR. BARNARD: We have not made that motion. I would be happy to do so.

THE COURT: I think that moves this case along, frankly. I don't know that it would be worth your – well, I am sure anything would be worth the time, but I am finding that the standing issue was previously abandoned by the city and then later the attempt to revive it after this Court had already entertained the case on its merits, and if the circuit wants to look at standing I guess they can. I'm quite inclined to find standing where they took the steps to actually write a letter to the city, and there has been no proof that Summum was not ready, willing and able to install its monument on city owned property or property deeded to it by the city. I think under the First Amendment standing cases that I read back when I was quite interested in it, it appeared to me that that was enough. It is an area where I think the courts are going to be giving quite a lot of latitude to plaintiffs. I don't think a simple reading about it in the newspaper and

then filing a federal court action would be enough, but they did more here. They actually took the steps to communicate with the city and seek the expression of their own free speech rights, to which they received a response, and from which sprang their complaint. I'm also being a little pragmatic there.

So for both of those reasons, for the lateness of it [36] being renewed as a legal proposition and in light of the rather tortured history in this case, and because I am finding on the merits that the plaintiffs have standing, I'll rule in favor of the plaintiffs on the standing issue.

APPENDIX D

SUMMUM VS. DUCHESNE CITY,
Case No. 2:03-CV-1049DB
United States District Court, District of Utah,
Central Division
Docket Report, 04/28/2005, Doc. 112

Minute Entry for proceedings held before Judge Dee Benson: Argument heard on pending motions. The Court denies Dft?s motion for summary judgment for lack of standing. The Court denies Pla?s motion to strike affidavits. The Court grants Dft?s motion to amend order as to Dft?s first two requests. The Court rules that Dfts violated pla?s constitutional rights. Counsel are to submit briefing regarding attorney fees. entered 76 Motion for Extension of Time, entered 83 Motion to Amend/Correct, granting in part and denying in part 86 Motion to Amend/Correct, entered 99 Motion to Amend/Correct, denying 101 Motion to Strike, Motion Hearing held on 4/28/2005 re 76 Motion for Extension of Time filed by Duchesne City,, Clinton Park,, Yordys Nelson,, Nancy Wager,, Paul Tanner,, Darwin McKee,, Jeannie Mecham,, 99 Motion to Amend/Correct filed by Duchesne City,, Clinton Park,, Yordys Nelson,, Nancy Wager,, Paul Tanner,, Darwin McKee,, Jeannie Mecham,, 83 Motion to Amend/Correct filed by Summum,, 101 Motion to Strike filed by Summum,, 86 Motion to Amend/Correct filed by Duchesne City,, Clinton Park,, Yordys Nelson,, Nancy Wager,, Paul Tanner,, Darwin McKee,, Jeannie Mecham,. Attorney for Plaintiff: Brain Barnard, Attorney for Defendant Francis Manion and Ed White. (Court Reporter Ed Young) (reb,) (Entered: 05/17/2005)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

SUMMUM,
Plaintiff,
vs.
DUCHESNE CITY, et al.,
Defendants,

Case No. 2:03cv1049

Judge Dee Benson

ORDER

The above captioned matter came before the Court for hearing on April 28, 2005, the Hon. Dee Benson, United States District Court Judge presiding, the Plaintiff appearing by and through counsel, Brian M. Barnard, of the Utah Legal Clinic, the Defendants appearing by and through counsel, Edward L. White, III (appearing pro hac vice), of the St Thomas More Law Center, and Francis J. Manion (appearing pro hac vice), of the American Center for Law and Justice. The Court, having reviewed the parties' briefing and having heard the parties' arguments, issues the following order.

1. Plaintiff's Motion for Summary Judgment Re: Declaratory relief and Damages (Doc. #91) is GRANTED in accordance with *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), and *Summum v. Ogden*,

297 F.3d 995 (10th Cir. 2002).

2. Defendants' Motion for Summary Judgment on Money Damages and Attorney Fees (Doc #88) is DENIED.

3. Defendants' Motion for Summary Judgment Re: Standing (Doc. #51) is DENIED.

4. Plaintiff's Motion to Strike Portions of affidavits (Doc. #101) is DENIED.

5. Defendants' Motion to Correct Docket Entry # 94 (Doc. # 99) is GRANTED as to paragraphs one and two of the motion. The motion is DENIED as to paragraph three.

6. SUMMUM is awarded $20.00 nominal damages. SUMMUM is also awarded attorney fees, the amount of which will be determined later based on a submission by the Plaintiff and a response by the Defendants. The award shall be limited to an amount consistent with the technical nature of the Defendants' violation as found by the Court.

IT IS ORDERED

DATED this 26th day of May, 2005.

/s/_____
Dee Benson
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

SUMMUM, a corporate sole and church

Plaintiff,

vs. Case No. 2:03CV0149

DUCHESNE CITY, et al., Judge Dee Benson

Defendants.

Before the Court is Plaintiff Summum's Motion to Set Attorney Fees. On May 26, 2005, the Court issued an Order awarding Plaintiff $20.00 nominal damages and attorney fees. The Order stated that the amount of the attorney fees would be determined later "based on a submission by the Plaintiff and a response by the Defendants." The Order further stated that the attorney fees would be limited "to an amount consistent with the technical nature of the Defendants' violation as found by the Court."

Plaintiff and Defendants have now briefed the issue and request a decision from the Court. Plaintiff argues that it is entitled to a full award of attorney fees, while Defendants argue that Plaintiff is entitled to either no fees, or a low fee award. For the reasons

set forth below, the Court finds that Plaintiff is entitled to a low fee award.

ANALYSIS

The background for this case can be found in the Court's Second Amended Opinion and Order, dated May 20, 2005. Having achieved a nominal victory, Plaintiff now argues that it is entitled under 42 U.S.C. § 1983 to an award of $69,444.00, which represents its full amount of attorney fees for this litigation.

The Civil Rights Attorney's Fees Awards Act states that "in any action or proceeding to enforce a provision of section . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. The United States Supreme Court has held that "a plaintiff who wins nominal damages is a prevailing party under § 1983." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). Plaintiff is thus eligible for an award of attorney fees, and the Court recognized as much in its May 26, 2005 Order. The task now before the Court is to determine what amount of an award is "reasonable." 42 U.S.C. § 1988. The Court's discretion is used to make this determination. *Id.*

Plaintiff and Defendant point out that courts have differed in what constitutes a reasonable award in a nominal damages case. The Supreme Court has identified three factors that courts consider in making this determination: (1) the difference between the amount sought and the damages recovered; (2) the significance of the legal issue on which the plaintiff claims to have prevailed; and (3) the accomplishment of a public goal other than occupying the time and

energy of counsel, court, and client. *Farrar*, 506 U.S. at 114-16; *id.* at 116-22, (O'Connor, J., concurring); *Barber v. Williamson*, 254 F.3d 1223, 1229-33 (10th Cir. 2001).

> No one factor is necessarily controlling; nor should all three factors necessarily be given equal weight. The bottom line is that all three factors should be given due consideration, but ultimately it is within the discretion of the . . . district court to determine what constitutes a reasonable fee given the particular circumstances.

Barber, 254 F.3d at 1233.

Under the first factor, the Court considers the difference between the amount sought and the damages recovered. In this case, Plaintiff originally sought general, special, and punitive damages "in the sum of at least one dollar ($1.00) each but in a larger and appropriate sum as to be determined at trial." Plaintiff later waived "all damages in excess of $20.00." The Court awarded Plaintiff nominal damages in the amount of $20.00. Thus, in terms of monetary damages, Plaintiff received what it sought. Plaintiff did not receive, however, the specific injunctive and equitable relief it demanded. Namely, Plaintiff wanted to be granted a plot of land and be allowed to erect its monument of seven aphorisms.

Under the second factor, the Court considers the significance of the legal issue on which the plaintiff claims to have prevailed. The Tenth Circuit has interpreted this factor as requiring a consideration of a plaintiff's "success as opposed to the importance of the legal issue . . . ." *Barber*, 254 F.3d at 1231. "In this circuit, the second factor . . . goes beyond the actual relief awarded [which is the focus of the first factor] to

examine the extent to which the plaintiff succeeded on [his] theory of liability." *Id.* (citation and quotation omitted) (alterations in original). In this case, Plaintiff succeeding in showing a technical violation by Defendants. Plaintiff did not succeed, however, in having the offending monument removed from the area, or in having its own monument erected.

Under the third factor, the Court considers whether the litigation accomplished a public goal. Relevant considerations include whether the plaintiff's victory will encourage attorneys to represent civil rights litigants, whether the victory affirms an important right, whether the violation was egregious, whether the victory will deter future lawless conduct, and whether the lawsuit set important precedent. *Id.* at 1231-32. This factor "should not be construed too liberally." *Id.* at 1233. While the free expression rights at underlying Plaintiff's claims are important, the Court finds that this lawsuit did not accomplish a significant furthering of those rights. This case did not halt egregious violations or set important precedent.

In addition to the three factors just discussed, the Court is also mindful of the *Farrar* court's statements regarding attorney fee awards in nominal damages cases. According to *Farrar*, "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all." *Farrar*, 506 U.S. at 115. A plaintiff receiving only nominal damages is often such a prevailing party. *Id.* This is because "damages awarded in a § 1983 action must always be designed to *compensate injuries* caused by the [constitutional] deprivation." *Id.* (citations and quotations omitted) (alteration and emphasis in original). Thus, for a plaintiff recovering only nominal

damages, "the only reasonable fee is usually no fee at all." *Id.* In addition, "fee awards under § 1988 were never intended to produce windfalls to attorneys." *Id.* (citation and quotation omitted).

CONCLUSION

Given the above analysis, the particular circumstances of the case, and the overall de minimus victory of Plaintiff, the Court finds that a low fee award is reasonable in this case. Accordingly, the court sets the attorney fee award for this case at $694.40.

IT IS SO ORDERED.

Dated this 16th day of Sept. 2005

By the Court

/s/_____
Dee Benson
Chief Judge
United States District Court

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church,

Plaintiff - Appellant/
Cross-Appellee,

v. No. 06-4057

DUCHESNE CITY, a governmental entity, et al.,

Defendants - Appellees/
Cross-Appellants.

SUMMUM, a corporate sole and church,

Plaintiff - Appellant,

v. Nos. 05-4152, 05-4168, 05-4272 & 05-4282

PLEASANT GROVE CITY, municipal corporation, et al.,

Defendants - Appellees.

ORDER
Filed September 5, 2007

Before **TACHA**, Chief Circuit Judge, **EBEL**, Circuit Judge, and **KANE**,* District Judge.

This matter is before the court on the Defendants' motions to stay the issuance of the mandates in the above captioned appeals. The motions are granted

Entered for the Court,

/s/_____
ELISABETH A. SHUMAKER
Clerk

*Honorable John L. Kane, Jr., Senior District Judge for the District of Colorado, sitting by designation.

APPENDIX H

No. 06-4057, Nos. 05-4162, 05-4168, 05-4272 & 05-4282

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church, Plaintiff-Appellant,

v.

PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD MCDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member; FRANK MILLS, City Administrator, Defendants-Appellees.

and

SUMMUM, a corporate sole and church, Plaintiff-Appellant/Cross-Appellee,

v.

DUCHESNE CITY, a governmental entity; CLINTON PARK, Mayor of Duchesne City; YORDYS NELSON; NANCY WAGER; PAUL TANNER; DARWIN MCKEE; JEANNIE MECHAM, city

council members, Defendants-Appellees-Cross-Appellants.

August 24, 2007, Filed

ORDER

Before TACHA, Chief Judge, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNELL, TYMKOVICH, GORSUCH, and HOLMES, Circuit Judges.

These matters are before the court on two separate petitions for rehearing, both with en banc suggestions, filed by the appellees. The petitions were filed separately and correspond to the two opinions issued in these appeals on April 17, 2007.

The requests for panel rehearing are denied by the original panel which decided these cases.

The en banc petitions were transmitted to all of the judges of the court who are in regular active service. A poll was requested. Through an equally divided vote, the decisions of the panel will stand. *See* Fed. R. App. P. 35(a); 10th Cir. R. 35.5 (noting that a majority of the active judges of the court may order rehearing en banc). Accordingly, the en banc requests are denied. Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch and Holmes would grant rehearing en banc. Judges Lucero and McConnell have filed dissents to the denial. They are attached and incorporated in this order. Judge Gorsuch has joined in Judge McConnell's dissent. Judge Tacha, writing separately, has responded. That response is also incorporated in this order.

LUCERO, J., dissenting from denial of rehearing en banc.

Because the panel's opinion will leave our circuit unnecessarily entangled in future review of time, place, and manner restrictions, and because in my judgment the panel's opinion incorrectly decides the question of the nature of the forum involved in cases of this type, I respectfully dissent from the denial of rehearing en banc. Conceptually, it is important to distinguish between transitory and permanent speech. As I see it, not unlike most public parks in America in which permanent monuments have been placed, the cases before us involve limited public fora. In limited public fora, local governments may make content-based determinations about what monuments to allow in such space, but may not discriminate as to viewpoint.

As an initial matter, I agree with the panel that these monuments do not constitute government speech. Under the *Wells* framework, the government must have exercised some control over the form and content of the speech before the fact, not merely accepted it after the fact. *Wells v. City & County of Denver*, 257 F.3d 1132, 1141-43 (10th Cir. 2001) (holding sign was government speech where the city had "complete control over the sign's construction, message, and placement"; the city "built, paid for, and erected the sign"; and corporate sponsors did not "exercise[] any editorial control over its design or content."). In these cases, the private parties conceived the message and design of the monuments without any government input, thus the speech must be considered private. *See Summum v. City of Ogden*, 297 F.3d 995, 1004-06 (10th Cir. 2002) (holding monument was not

government speech where Fraternal Order of Eagles "designed, produced, and donated the Ten Commandments Monument"; central purpose of monument was "to promote the views and agenda of the Eagles rather than the City of Ogden"; "Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product"; and city only claimed to adopt views of monument "post hoc"). It follows that these cases necessarily implicate government regulation of private speech.[1]

Whether government regulation of private speech violates the First Amendment depends on context. Courts engage in forum analysis to determine whether the speaker acts in a traditional public forum, a designated public forum, or a nonpublic forum, and it is in this analysis that I differ with the panel. In identifying the type of forum involved, we first consider the government property at issue and the type of access sought. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *City of Ogden*, 297 F.3d at 1001. Only after the type of forum is identified do we ask whether it is public or nonpublic in nature. Because the government property involved in these cases consists of the city parks, and the access sought is the installation of permanent monuments, the panel correctly concludes that the relevant forum consists of permanent monuments in the city parks. *See Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007); *Summum v. Duchesne City*, 482

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[1]Although the monument involves a religious message, these cases properly consider the question of free speech, not establishment of religion.

F.3d 1263, 1269 n.1 (10th Cir. 2007). In the next step of the forum analysis, however, the panel asserts that the relevant forum is the entire park, regardless of the type of access sought. *Pleasant Grove*, 483 F.3d at 1050; *Duchesne*, 482 F.3d at 1269. The panel's claim that access "is relevant in defining the forum, but . . . does not determine the *nature* of that forum," *id.* at 1269 n.1, confuses the forum analysis. Only by defining the forum with reference to the access sought can a court determine the nature of that forum. *See Cornelius*, 473 U.S. at 801. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, a case which the panel cites, the Supreme Court first narrowed the forum to the mail delivery system within a school, and only then did it consider the nature of this forum; it did not simply conclude that schools in general are public fora. 460 U.S. 37, 49 (1983). *Perry* also held that a court may make conceptual distinctions in defining the forum, even if there are no physical barriers. *See Cornelius*, 473 U.S. at 801 ("*Perry* . . . examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an 'internal mail system' lacks a physical situs.") (citation omitted). As in *Perry* and *Cornelius*, Summum seeks access to a particular means of communication, but the nature of the forum necessarily hinges both on the method of communication and on the location.

The panel gives great weight to the conception that city parks are "quintessential public forums," *see Perry*, 460 U.S. at 45, but in my view, permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public. In *Perry*, the Court noted that parks are "places which by *long*

tradition or by government fiat have been devoted to *assembly and debate*," and "which have *immemorially* been held in trust for the use of the public, and, *time out of mind*, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (quotation omitted) (emphasis added). As *Perry* indicates, our modern concept of the park as a public forum derives from a well-established common law right to assemble and speak one's mind in the commons. This right, however, does not extend to the type of displays at issue here, and one would be hard pressed to find a "long tradition" of allowing people to permanently occupy public space with any manner of monuments. In short, a park is a traditional public forum when access is sought to it for temporary speech and assembly, such as protests or concerts, but it hardly follows that parks have been held open since time immemorial for the installation of statues of Balto the Husky or the sword-wielding King Jagiello, to note two of the more popular attractions in New York City's Central Park.

I recognize that there is some disagreement among our sister circuits on this point, but courts consistently have given special consideration to the issue of displays installed on public land. In *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993), the Seventh Circuit held that "[t]here is no private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." (quotation and citation omitted). The Second Circuit in *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), determined that the city "had not created a forum in City Hall Park open to

the unattended, solitary display of religious symbols." By stating that the City of Burlington must affirmatively open the public park for this kind of use, the Second Circuit recognized that such physical occupation of park space does not fall within the scope of the traditional public forum, but rather the government must assent to such access before a forum is created. By contrast, the Ninth Circuit has held that "[n]o affirmative government action is required to open a traditional public forum to a specific type of expressive activity." *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir. 1993). *Kreisner* acknowledged, however, that the government might close the park with respect to large unattended displays, but held that the plaintiff had failed to meet his burden of proof on this point. *Id.* This is to say, that even the *Kreisner* court has recognized that it is not a foregone conclusion that parks are traditional public fora for all uses, particularly for the installation of permanent displays.

In my view a park is not a traditional public forum insofar as the placement of monuments is concerned, but that still leaves the question of whether it is a designated public forum or a nonpublic forum. Although there is a disagreement among our sister circuits regarding the categorization of limited public fora, this circuit and recent Supreme Court opinions have treated limited public fora as a species of nonpublic fora. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (in a limited public forum, the state may restrict speech but many not discriminate on the basis of viewpoint (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius*, 473 U.S. at 806)); *City*

of Ogden, 297 F.3d at 1002 n.4 ("A 'limited public forum' is a subset of the nonpublic forum classification."); *Callaghan*, 130 F.3d at 914 ("In more recent cases . . . the Court has used the term 'limited public forum' to describe a type of nonpublic forum"); *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 382 n.3 (4th Cir. 2006) (surveying conflicting views among the circuits). In the present cases, the city governments have not allowed the kind of "general access" or "indiscriminate use" of park property that is a hallmark of a designated public forum. *Summum v. Callaghan*, 130 F.3d 906, 915 n.13 (10th Cir. 1997) (*citing Cornelius*, 473 U.S. at 803; *Perry*, 460 U.S. at 47). Instead, they have "create[d] a channel for a specific or limited type of expression where one did not previously exist," *Child Evangelism Fellowship*, 457 F.3d at 382, and have thus established limited public fora. As discussed *supra*, the right to install permanent monuments did not previously exist in these parks, and in these cases the cities have allowed only "selective access to some speakers or some types of speech in a nonpublic forum." *Callaghan*, 130 F.3d at 916. Here, the cities have permitted a few monuments to be erected for specific purposes -- in the case of Pleasant Grove, to memorialize the city's history, and in the case of Duchesne, to honor service groups. Having created limited public fora, the cities may make reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks.[2] *Cornelius*, 473 U.S. at 806.

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[2]By contrast, when the government itself speaks, it may discriminate as to both content and viewpoint. *Rosenberger*, 515

There are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora, and the need for further briefing and argument on this point is one reason why en banc proceedings are necessary. More importantly, however, the panel has given an unnatural reading to the traditional public forum doctrine, and binds the hands of local governments as they shape the permanent character of their public spaces. Although these governments may enact time, place, and manner restrictions that will give them some control over monuments in their parks, they now must proceed on the basis of the panel's faulty legal reasoning. More troubling is that such restrictions will undoubtedly be challenged in court and reviewed under a strict scrutiny standard. The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

U.S. at 833.

McCONNELL, J., joined by GORSUCH, J., dissenting from denial of rehearing en banc.

These opinions hold that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content -- unless their reasons for refusal rise to the level of "compelling" interests. *See Summum v. Duchesne City*, 482 F.3d 1263, 1274 (10th Cir. 2007) (a "constitutional right exists to erect a permanent structure on public property . . . when the government allows some groups to erect permanent displays, but denies other groups the same privilege"); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1054 (10th Cir. 2007) (the city "could ban all permanent displays of an expressive nature by private individuals" but may not exclude a monument based on its content unless the restriction serves "compelling" interests and is "narrowly tailored to achieve its stated interests"). This means that Central Park in New York, which contains the privately donated Alice in Wonderland statute, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

Significantly, the religious nature of the donated

monuments is not relevant to the free speech question (though it would be to an Establishment Clause challenge). These cases happen to involve Ten Commandments monuments, but it could work the other way. A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument -- or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

With all due respect to the panel, this conclusion is unsupported by Supreme Court precedent. None of the cases cited supports this proposition. By tradition and precedent, city parks -- as "traditional public forums" -- must be open to speeches, demonstrations, and other forms of transitory expression. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties. By their policies or actions, governments may create designated public forums with respect to fixed monuments, but -- contrary to these opinions -- the mere status of the property as a park does not make it so.

It is plain that the cities in these cases did not create designated public forums for the erection of permanent monuments in their parks. In the *Duchesne* case, the Ten Commandments monument is apparently the only fixed monument in the park. In *Pleasant Grove*, the other permanent structures and monuments "relate to or commemorate Pleasant Grove's pioneer history." 483 F.3d at 1047. In neither case did the city, by word or deed, invite private citizens to erect monuments of their own choosing in

these parks. It follows that any messages conveyed by the monuments they have chosen to display are "government speech," and there is no "public forum" for uninhibited private expression.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court considered a nearly identical monument donated by the Fraternal Order of Eagles to the State of Texas and displayed under analogous circumstances. Without dissent on this point, the Court unhesitatingly concluded the monument was a *state* display, and applied Establishment Clause doctrines applicable to government speech. *Id.* at 692 (calling the monument "Texas' display"). Various courts of appeals have reached the same conclusion on similar facts. *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 778, 774 (8th Cir. 2005) (Eagles monument "installed . . . by the City" and counted as "City's display"); *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) (Eagles monument belonged to the state); *Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (donated Eagles monument constituted state speech in violation of the Establishment Clause); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001) (city's acceptance of donated Ten Commandments monument constituted state action in violation of the Establishment Clause); *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) (city's display of Ten Commandments monument was state action violating Establishment Clause). *See also Modrovich v. Allegheny County*, 385 F.3d 397, 399-400 (3d Cir. 2004) (bronze plaque of Ten Commandments donated by private party and affixed to courthouse wall constituted government speech).

Our own leading precedent on government speech confirms these holdings.[1] *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001), involved a temporary holiday display, which was on municipal property and co-sponsored by the city and private businesses; the display included a large sign on city property thanking private donors for their contributions to the city's holiday display. The Court concluded that the message conveyed by this sign was government speech. The city, we reasoned, chose to erect the sign for its own purposes, the city controlled the content of the sign, and it determined when, where, and how the sign would be displayed. 257 F.3d at 1141-42. *Wells* employed a four-part analysis derived from the Eight Circuit's *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), which involved the asserted right of the Missouri KKK to sponsor a segment of All Things Considered on National Public Radio.[2] In both *Wells*

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[1]To the extent *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), teach the contrary, they should be overruled.

[2]The factors were:

> (1) that "the central purpose of the enhanced underwriting program is not to promote the views of the donors;" (2) that the station exercised editorial control over the content of acknowledgment scripts; (3) that the literal speaker was a KWMU employee, not a Klan representative; and (4) that ultimate responsibility for the contents of the broadcast rested with KWMU, not with the Klan.

and *Knights*, the governmental or private character of the speech was in doubt because "ownership" could not be clearly established. Did the holiday decor belong to the city or to the private donors in *Wells*? Did the sponsorship message written by the KKK belong to that organization or to the public employee who broadcast it statewide on a state radio station?

The instant cases are easier than *Wells*, because ownership of the "speech" in these cases is clear: the Ten Commandments monument in *Duchesne* was donated by the Cole family to the City of Duchesne, and the Ten Commandments monument in *Pleasant Grove* was donated by the Fraternal Order or Eagles to the City of Pleasant Grove. At the relevant time, the cities owned the monuments, maintained them, and had full control over them. But even if ownership were not clear, the second and fourth prongs of the *Wells* test would nonetheless be dispositive: The cities exercised total "control" over the monuments, 257 F.3d at 1141, and they bore "ultimate responsibility" for the monuments' contents and upkeep. Indeed, because the cities owned the monuments, they could have removed them, destroyed them, modified them, remade them, or (following state law procedures for disposition of public property) sold them at any time. Indeed, the City of Duchesne attempted to do just that -- sell the monument along with the plot of land on which it sits. See 482 F.3d at 1266-67.[3] *Cf. Serra v. U.S. General*

Wells, 257 F.3d at 1141 (quoting *Knights of the Ku Klux Klan*, 203 F.3d at 1093-94).

[3]Indeed, the panel held that Duchesne's attempted sale of the monument is controlled by state law governing the disposition of "public property." *Duchesne*, 482 F.3d at 1272.

Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) (holding that when an artist donates or sells a piece of art to the government for public display, the artist loses control over the artwork).

The only difference from *Wells* is that in the *Summum* cases, the cities did not design these monuments. The cities, however, accepted the statues, treated them as public property, and displayed them for their own purposes on public land. The cities were under no obligation to accept the statues, and could have objected to their content. When they accepted donation of the monuments and displayed them on public land, the cities embraced the messages as their own. Similarly, Duchesne and Pleasant Grove controlled the placement of the statues, just as in *Wells* Denver bore "ultimate responsibility for the content of the display." 257 F.3d at 1142.

Once we recognize that the monuments constitute government speech, it becomes clear that the panel's forum analysis is misguided. Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public forums, but the government's "own speech . . . is controlled by different principles." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). Specifically, "when the State is the speaker, it may make content-based choices." *Id.* at 833. *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991). The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause -- and need not alter its speech to accommodate the views of private parties. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) ("Simply

because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist.") In other words, just because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing.

Other circuits have reached this conclusion in similar cases. *See Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) ("Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved."); *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc) ("even in a public forum there is no constitutional right to erect a structure"); *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("We are not cognizant of . . . any private constitutional right to erect a structure on private property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures.").

This does not mean that the Ten Commandments monuments in Duchesne and Pleasant Grove are immune to First Amendment challenge. Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause, as applied to the States through the Fourteenth Amendment. Their validity would depend on details of their context and history, in accordance with the Supreme Court's recent decisions in *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, 545 U.S. 677 (2005). We have no occasion here to speculate on the outcome of any such litigation.

The panels' decisions in these cases, however, are incorrect as a matter of doctrine and troublesome as a matter of practice. I realize that en banc proceedings are a major investment of time and judicial resources, and that we cannot en banc every case that errs. But the error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decisions should be corrected.

TACHA, J., response to dissent from denial of rehearing en banc.

Throughout my judicial career, I have been loath to write separately because I firmly believe that an intermediate court of appeals should speak with as much clarity and consensus as possible. I reluctantly take the unprecedented step of responding to the dissents from the denial of rehearing en banc because, left unanswered, the dissents could lead a reader to conclude that these cases present unresolved issues that are properly raised and appropriately addressed on these facts. In particular, I write to emphasize that these cases do not raise novel or unsettled questions regarding government speech. Nor do the panel decisions suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium. Rather, the decisions follow well-established First Amendment precedent requiring that cities regulate private speech in public forums equally.

Because the opinions contain clear discussions of the legal authority on which they rely, I need not respond at length to the allegation that they are unsupported by Supreme Court precedent. I need only say that the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. In fact, this distinction, so crucial to the reasoning of both dissents, lacks the support of both precedent and logic. If a city allows a private message to be heard in a public park, why would the permanent nature of the expression limit the First Amendment scrutiny we apply?

As Supreme Court precedent makes clear, the type

of speech does not, and should not, determine the nature of the forum. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding that city's restriction on *permanent* commercial newsracks on *public sidewalks* (a public forum) was an impermissible content-based restriction on speech). If a city wishes to regulate the number of permanent private displays in a public forum, it may do so through reasonable content-neutral regulations governing the time, manner, or place of such speech. *See id.* at 429-30 ("It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral."); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (noting that a reasonable content-neutral ban on all unattended private displays in public forum would likely be constitutional, but a regulation based on content must be "necessary, and narrowly drawn, to serve a compelling state interest").[1]

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[1]Contrary to Judge Lucero's dissent, the description of the forum as "permanent monuments in a city park" does not change the nature of the forum from a traditional public forum to some kind of limited or nonpublic forum. To focus solely on the monuments (i.e., the form of speech) and ignore the underlying property would be a distortion of Supreme Court precedent, as explained above. Furthermore, the conclusion that permanent speech is more limited than transitory speech defies logic. Like temporary signs and demonstrations, permanent displays most certainly encompass the government property; indeed, permanent monuments are physically attached to and always present on the property. Unlike the speaker in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), who sought access to teachers' mailboxes, Summum did not seek access to "a forum within the confines of the government property," *Cornelius v.*

Judge McConnell's dissent would have us ignore these well-established forum principles when the government does not "by word or deed" create a designated public forum for permanent private expression. Dissent at 3. In this view, if the government has not created a designated public forum, its acceptance alone turns private speech into government speech. More important, under this approach, government acceptance of the physical *medium* of speech, not the message, is sufficient. This approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.

NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985); rather, it sought permanent access to the physical property itself. Thus, although the relevant forum in these cases is "permanent monuments in a city park," the access sought is not the kind of limited access that allows for a more narrow definition of the forum. This is true even if we accept the view that a speaker does not have a constitutional right to erect a permanent display in a public forum. Because the cities had already permitted the permanent display of a private message, the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally *discriminate* among private speakers in a public forum.

Although a public school is engaging in speech activity when it selects the text, its ability to do so is based on a different line of Supreme Court cases recognizing the government's ability to make content-based judgments when it acts in particular roles (e.g., educator, librarian, broadcaster, and patron of the arts). We note this distinction in both opinions. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052 n.4 (10th Cir. 2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1269 n.2 (10th Cir. 2007).[2] In light of this precedent, the City of New York, acting as a patron of the arts, need not worry about having to erect all manner of structures based on the installation of Alice in Wonderland and other works of art in Central Park. We cannot, however, extend the reasoning of these Supreme Court decisions to allow the government to make content-based decisions concerning *all* permanent private speech in a public forum. As the panel decisions explain, the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts.

In short, the government does not speak just

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[2]We cite the following Supreme Court cases in both opinions: *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs may consider content in making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) (recognizing that broadcasters must "exercise substantial editorial discretion in the selection and presentation of their programming"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may consider content in awarding grants as such judgments "are a consequence of the nature of arts funding"). *See Pleasant Grove City*, 483 F.3d at 1052 n.4; *Duchesne City*, 482 F.3d at 1269 n.2.

because it owns the physical object that conveys the speech. Instead, as the Supreme Court has explained, the appropriate inquiry is whether the government controls the content of the speech at issue, that is, whether the message is a government-crafted message. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560 (2005) (holding that beef advertising campaign constituted government speech because the "message set out in the beef promotions is from beginning to end the message established by the Federal Government"). The four-factor approach to government speech that we adopted in *Wells v. City and County of Denver*, 257 F.3d 1132, 1140-42 (10th Cir. 2001), reflects the Supreme Court's focus on whether the message is the government's own. But contrary to Judge McConnell's dissent, we said nothing in *Wells* that suggests our government speech inquiry turns on the ownership of the physical medium conveying the speech at issue.[3] Indeed, the second *Wells* factor cited by the dissent is not about controlling the physical medium of the speech, but about controlling the *content* of that speech. *See id.* at 1142 (finding that the city exercised editorial control over the content of the speech). A city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any private message as its own without subjecting the

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[3]Moreover, contrary to Judge McConnell's dissent, *see* Dissent at 4, the city's ownership of the holiday display in *Wells* was clearly established. *Wells*, 257 F.3d at 1139 (noting that, as a factual matter, "Denver owns each component part of the display").

message to the political process, a result that would shield the government from First Amendment scrutiny and democratic accountability.

This is in fact the result that Judge McConnell's dissent advocates, and it is most apparent in the dissent's equation of government endorsement in the Establishment Clause context with government speech under the Free Speech Clause. Citing *Van Orden v. Perry*, 545 U.S. 677 (2005), the dissent emphasizes that the Supreme Court has characterized a Ten Commandments monument under analogous circumstances as a "state display" for purposes of the Establishment Clause. *See id.* at 692 (holding that "Texas' display of this monument" did not violate the Establishment Clause). The simplest response to this observation is that a state's display of a monument is not necessarily state speech; if the government *displays* a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own. *See Pleasant Grove City*, 483 F.3d at 1047 n.2 (explaining that the government may violate the Establishment Clause without directly speaking). *Van Orden* and the circuit cases cited by the dissent stand for the simple proposition that a city's acceptance and display of a privately donated monument with religious content may constitute state *action* violating the Establishment Clause. But none of these cases supports the proposition that, when the state acts to accept a monument, it automatically turns the

message that monument conveys into state speech.[4]

On a broader note, because the Establishment and Free Speech Clauses serve different purposes, discussions of state action in Establishment Clause cases are not germane to a determination of when the government speaks for purposes of the Free Speech Clause. Indeed, the Supreme Court has analyzed government speech differently in the context of free speech, recognizing the differing theoretical justifications underlying the Establishment and Free Speech Clauses. In the Establishment Clause context, government speech favoring or disfavoring religion is a concern because of the effect it may have on individual members of the political community: "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Indeed, in deciding that a student-led "invocation" permitted by school policy could "not properly [be] characterized as 'private speech'" under the Establishment Clause, the Supreme Court focused explicitly on the message that government *sponsorship* sends members of the community: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the

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[4]In fact, one case cited in Judge McConnell's dissent contains language specifically rejecting this proposition. *Modrovich v. Allegheny County*, 385 F.3d 397, 410-11 (3d Cir. 2004) ("The fact that government buildings continue to preserve artifacts of [the country's religious] history does not mean that they necessarily support or endorse the particular messages contained in those artifacts.").

audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quotation omitted). In other words, the government's sponsorship of religion sends an impermissible "ancillary message" that renders the speech not entirely private.

The same concerns do not underpin the Free Speech Clause. Although individuals may constitutionally challenge government sponsorship or endorsement of religion, they generally have no constitutional right to challenge government speech under the Free Speech Clause. In the free speech context, the fact that government speech is exempt from constitutional challenge is justified because it is subject to the political process:

> The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."

Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). That is, the latitude that government speech enjoys in the free speech context is justified by the "*political safeguards*" in the democratic process that set government speech

"apart from private messages." *Johanns*, 544 U.S. at 563 (emphasis added). Thus, its immunity from constitutional challenge under the Free Speech Clause does not depend on whether the "reasonable observer," familiar to Establishment Clause jurisprudence, would perceive the government as speaking.

Rather, if citizens object to the government's message, they may elect new representatives who "later could espouse some different or contrary position." *Southworth*, 529 U.S. at 235. But in order for citizens to be able to hold the government accountable for its speech, the government must speak subject to "traditional political controls [that] ensure responsible government action." *Id.* at 229; *see also Johanns*, 544 U.S. at 560-64 (concluding that promotional program was subject to adequate safeguards because its message was prescribed by federal law and the government supervised and controlled the program and the contents of its message). The speech in these cases was not subject to political safeguards; the facts simply do not implicate government speech because the cities exercised no control over the content of the messages.

Thus, in the context of the Free Speech Clause, we cannot extend the government speech doctrine any further. To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own. Moreover, because the Establishment Clause would apply only to religious expression, an expanded government speech doctrine would effectively remove the government's regulation of permanent non-religious speech from all First Amendment scrutiny. Such an approach is clearly

contrary to established First Amendment principles. *See Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 795-96 (4th Cir. 2004) ("The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process."). Because this approach to government speech is unsupported by Supreme Court precedent and the purposes of the First Amendment, this Court may not consider it. And because the relevant law and its application are clear, en banc consideration is inappropriate.

APPENDIX I

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

APPENDIX J

DUCHESNE CITY
ORDINANCE NO. 04-2

AN ORDINANCE ADDING SECTION 7-4-2 TO THE DUCHESNE CITY MUNICIPAL CODE REGARDING DISPOSAL OF PARCELS OF REAL PROPERTY AND DEFINING TERMS

WHEREAS, on June 29, 2004 the city council (the "Council") of the City of Duchesne (the "City) met in regular session to consider, among other things, adding Chapter 4-2, to Section 7 of the Duchesne Municipal Code regarding disposal of parcels of real property and defining terms; and

WHEREAS, in *Toone, et. al. v. Weber County*, et. al., 2002 UT 103 (2003) the court held that counties (applicable to municipalities by analysis) must submit proposed sales of real estate to their planning commission for review and recommendation or the sale is void; and

WHEREAS, H.B. 122, second substitute (codified in part as Utah Code Ann. § 10-8-2, as it applies to municipalities), eliminates the *Toone* requirement and requires that before a municipality may dispose of significant parcels of real property, the municipality shall provide reasonable notice of the proposed disposition and allow an opportunity for public comment. Further, it requires each municipality, by ordinance, to define what constitutes significant parcels of real property and reasonable notice; and

WHEREAS, the Council desires to comply with H.B. 122, second substitute, by adopting definitions of

"a significant parcel of real property," "reasonable notice," and helpful definition of "disposition"; and

WHEREAS, after careful consideration, the Council has determined that it is in the best interest of the health, safety and welfare of the citizens of the City to add Chapter 4-2 to Section 7 to the Duchesne Municipal Code regarding disposal of parcels of real property," and defining terms.

NOW, THEREFORE, BE IT ORDAINED by the Council that the following be added as Section 7-4-2 of the Duchesne Municipal Code:

SECTION:

7-4-2: DISPOSAL OF PARCELS OF REAL PROPERTY

CHAPTER 4:

MUNICIPAL PROPERTY; USE AND CONTROL

SECTION:
7-4-2A Notice Required
7.4.2B Public Comment
7-4-2C Definitions

A. NOTICE REQUIRED: If the property that is declared surplus pursuant to section 7-4-2C is a significant parcel of real property as defined in this section, then the City shall provide reasonable notice, as defined below, of the proposed disposition at least 14 days before the proposed disposition, to provide the public an opportunity for comment on the proposed disposition.

B. PUBLIC COMMENT: If the City receives public comment on the proposed disposition, the City Recorder shall forward copies of such public comment to the city council. Thereafter, the city council may rescind its declaration of surplus property, direct the mayor to proceed with the sale, or impose such additional terms and conditions as the city council may adopt.

If the City does not receive public comment on the proposed disposition, the mayor may proceed with the sale after satisfying all of the other terms and conditions applicable to the disposition.

C. DEFINITIONS: For purposes of this section, "disposition" shall mean to transfer control of city owned property to another by any means including, but not limited to, sale, lease or other type of conveyance of such property.

1. For purposes of this section "reasonable notice" shall mean posting notice of the proposed disposition in at least three public places within the city and publishing notice of the proposed disposition in a newspaper of general circulation in the city.

2. For purposes of this section, "significant parcel of real property" shall mean a parcel of real property owned by the city with a reasonable value equal to or greater than $100,000 or reasonable yearly rental value equal to or greater than $15,000.

If any provision of this Ordinance is held by a court of competent jurisdiction to be unconstitutional or for any reason invalid, such ruling or decision shall not affect the validity of the remaining provisions, which are adopted separately and independently and shall remain in full force and effect.

This Ordinance, assigned Ordinance No. 04-2 shall

take effect as soon as it shall be published or posted as required by law, deposited and recorded in the office of the City Recorder, and accepted as required herein.

PASSED AND APPROVED this 29th day of June, 2004.

/s/_____
Clinton Park, Mayor

ATTEST:

/s/_____
Diane Miller, City Recorder

APPENDIX K

ORDINANCE NO. 04-4

An Ordinance of the Duchesne City Council,
Duchesne County, Utah
Vacating a Portion of Roy Park
and Providing an Effective Date

WHEREAS, in a portion of Roy Park there is currently displayed a certain stone monument donated to the City of Duchesne in loving memory of Irvin A. Cole by his wife, Leona Cole, and his daughters, Rae Donna, Lou Ann, and Ro Jean, which monument contains, among other things, a version of the Ten Commandments; and

WHEREAS, the presence of said monument has led to the filing of a lawsuit against the City which lawsuit claims that by the City's display of the Cole family's memorial, the City has created a public forum or limited public forum requiring the City to set aside portions of Roy Park for the display of memorials, monuments, and other donations from private individuals and organizations; and

WHEREAS, the City never intended to, did not, and does not wish to open Roy Park or any portions thereof as a forum for the display of memorials, monuments or other donations from private individuals and organizations; but

WHEREAS, the City does not wish to show disrespect or ingratitude to the Cole family, particularly in light of the many years of civic service rendered to our community by the late Irvin and Leona

Cole by removing the monument in question from the place it has occupied since 1979; and

WHEREAS, the City Council has determined that that portion of Roy Park on which the Cole monument stands is no longer needed for public purposes; and

WHEREAS, the City Council has determined that the sale of said portion of Roy Park will further the important public interests of terminating potentially costly litigation and avoiding future litigation by permanently closing Roy Park as a forum for such private displays;

NOW THEREFORE, Be It Ordained by the City Council of Duchesne, Duchesne County, Utah, as follows:

1. That the portion of Roy Park described in Exhibit "A" incorporated herein shall be vacated.

2. That the Mayor is authorized to execute all documents related to vacating the described portion of Roy Park and to the selling of same.

3. All ordinances, resolutions or policies in conflict herewith are repealed.

4. This ordinance shall take effect immediately upon passage.

PASSED this 29th day of June, 2004.

/s/_____
Clinton Park, Mayor

ATTEST:

/s/_____
Diane Miller, City Recorder

[Description of monument parcel omitted]

APPENDIX L

RESOLUTION No. 04-3

A Resolution of the Duchesne City Council,
Duchesne County, Utah
Authorizing the Mayor to Execute Quit Claim Deeds
to the
Portion of Roy Park Which was Vacated by the City.

WHEREAS, the Duchesne City Council approved Ordinance No. 04-4, vacating a portion of Roy Park; and

WHEREAS, Section 10-8-1 Utah Code Annotated, 1953 (as amended) grants the city council the power to control the finances and property of the corporation; and

WHEREAS, Section 10-8-2 Utah Code Annotated, 1953 (as amended) grants the city council the power to purchase, receive, hold, sell, lease, convey, and dispose of real and personal property for the benefit of the city; and

WHEREAS, it is necessary to dispose of certain parcels of real property as a result of the vacation of a portion of a public park; and

WHEREAS, the Duchesne City Council has determined that it is in the best interests of the citizens of the city to dispose of said property; and

NOW THEREFORE, Be It Resolved by the City Council of Duchesne, Duchesne County, Utah as follows:

1. The Mayor or his designee is hereby authorized

to execute Quit Claim Deeds in favor of Rae Donna Jones, Lou Ann Larson and RoJean Rowley for the subject property or properties more particularly described in the vacation plat attached as Exhibit "A" and incorporated herein.

THE RESOLUTION APPROVED and adopted this 29th day of June, 2004, by the City Council of Duchese, Duchesne County, Utah.

/s/ _____
Clinton Park, Mayor

ATTEST:

/s/_____
Diane Miller, City Recorder

[Description of monument parcel omitted]

86

(4)

No. 07-690

FILED
FEB 25 2008
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DUCHESNE CITY, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Duchesne City owns and operates a city park that contains a monument, donated by a local family, with an engraved depiction of the Ten Commandments. In an effort to disassociate itself from that expression, the City twice attempted to transfer the small plot of park land on which the monument stands to private parties. Respondent Summum asked the City for permission to display its own monument in the park or to be transferred a similar plot of park land on which to display its monument. The City denied that request.

The United States Court of Appeals for the Tenth Circuit held that the City's first attempted land transfer was invalid under state law, and that the city violated Summum's rights under the Free Speech Clause of the First Amendment by denying it equal access to a traditional public forum absent a compelling reason. The court remanded the case for additional proceedings with respect to the effect and the state-law validity of the City's second attempted transfer. The question presented is:

Whether the Tenth Circuit erred in holding that the City's attempted land transfer was invalid under state law, so that the Ten Commandments monument remained a part of a traditional public forum, within which the City could not deny equal access to other speakers.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 2
A. Factual Background 2
B. Proceedings Below 3
REASONS FOR DENYING THE WRIT 10
CONCLUSION 14

TABLE OF AUTHORITIES

Page

Freedom from Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000).....5

Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007).....1, 9

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners present this case to the Court in tandem with another certiorari petition, *Pleasant Grove v. Summum*, No. 07-665. As we have explained in our Brief in Opposition in *Pleasant Grove*, review is unwarranted in that case. The instant case presents an even less appropriate vehicle for review of the issues petitioners would have the Court consider.

In this case, petitioners never – at *any* stage of the litigation below – raised the question at the heart of their petition for certiorari, namely, whether the depiction of the Ten Commandments on the park monument constitutes government, rather than private, speech for First Amendment purposes. To be sure, that issue was not fully briefed in the *Pleasant Grove* litigation, either. *See* Pleasant Grove Brief in Opposition ("BIO") at 2, 7-8, 16-17. But here, petitioners never once even alluded to the issue – not before the district court, not before the court of appeals panel, and not before the full Tenth Circuit on petition for rehearing *en banc*.

Instead, petitioners chose a diametrically opposed litigation strategy: They argued that by attempting to sell the land on which the Ten Commandments monument stood, the City had, in the words of the district court below, "rid itself of any association with the sponsorship of that particular expression." Pet. App. 9b. As a result, the issue actually at the heart of this case is the validity under state law of the City's two purported land transfers, not the governmental or private status of the speech in question. And having argued strenuously below

that "the City has nothing to do with the property or anything expressed on the property by its private owners," *id.* 11b, petitioners are poorly positioned to claim now, for the first time, that the speech in question is properly viewed as "government speech" for Free Speech Clause purposes.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Duchesne City ("the City") is a municipality in Duchesne County, Utah, that is home to Roy Park. Pet. 4. That city park contains a "Fraternal Order of Eagles-style" Ten Commandments monument donated by the Cole family in 1979. *Id.* The City has never taken any steps to adopt the message on the Ten Commandments monument as its own. Instead, after the monument had been displayed in Roy Park for nearly 25 years, the City attempted to "disassociate itself from . . . [that] display of private expression" by giving away the land on which it stood. Pet. App. 9b; *see also id.* 2a, Pet. 5. In August 2003, the mayor executed a quitclaim deed transferring the 10' x 11' plot of land in Roy Park that housed the monument to the Duchesne Lions Club, of which the mayor was also president. Pet. App. 2a; Pet. 5. The contract for the transfer cited the Lion's past "work in cleaning and beautifying the city as consideration for the transfer." Pet. App. 2a.

Summum is a corporate sole and church founded in 1975 and headquartered in Salt Lake City, Utah. In September 2003, Summum sent a letter to the City asking either for permission to erect a monument depicting the Seven Aphorisms of Summum in

Roy Park, or to be given a small plot of land in the park to display its monument. Pet. App. 2a; Pet. 5. In its request, Summum specifically asked for the same access to city property as the Lions Club received. *Id.* In a responsive letter, the City stated that it would grant Summum a plot of land in Roy Park "if the organization contributed the same amount of service to the City as the Lions Club had contributed." Pet. App. 2a. Summum treated this letter as a denial of its request. *Id.* 3a.

On June 16, 2004, after Summum filed suit and the parties filed cross-motions for summary judgment, the mayor, as president of the Lions Club, transferred the park land back to the City, again by executing a quitclaim deed. *Id.* 20a; Pet. 6. "[I]n another effort to distance itself from the monument," Pet. App. 10b, the City then authorized the mayor to sell the Ten Commandments plot of land to the Cole daughters, whose family had originally donated the monument, for $250 "and other considerations." *Id.* 20a.[1] Following the sale, the City erected a four-foot tall white picket fence around the property, as well as a sign that declares that the City does not own the property. *Id.* 3a.

B. Proceedings Below

1. On November 26, 2003, Summum filed suit against the City and various current and former City

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[1] The city council conceded that it authorized the sale to the Cole daughters for purposes of this litigation, as it declared "the sale of said portion of Roy Park will further the important public interests of terminating potentially costly litigation and avoiding future litigation by permanently closing Roy Park as a forum for such private displays." Pet. App. 11.

officials in the U.S. District Court for the District of Utah under 42 U.S.C. § 1983 and the Utah Constitution. The complaint asserted violations of Summum's rights under the Free Speech Clause of the First Amendment to the United States Constitution, and the Free Speech and Establishment Clauses of the Utah Constitution. *See* Compl. 11-13. Summum sought declaratory and injunctive relief, as well as damages. *Id.*

The parties filed cross-motions for summary judgment. Summum argued that even if the land transfers were valid, its Free Speech rights were violated because the City denied Summum the same access to a traditional public forum that it had afforded other private parties. *See* Pl.'s Mem. re: Mot. for Summ. J. 3; Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J. 13-15. The City maintained that before it effected its land transfers, the park was a nonpublic forum for permanent monuments, in which its rejection of Summum's request on the basis of the speaker's identity was permissible. Once it transferred the land on which the Ten Commandments monument stood, the City argued, it was no longer associated with the monument, and the nature of the forum "*changed the forum of Roy Park*, from a nonpublic forum of permanent private monuments to a nonpublic forum of no permanent private monuments." *See* Defs.' Mem. of Law in Supp. of Defs.' Mot. for Summ. J. 16; *id.* at 6-7. The City did not even suggest that during any time period – pre- or post-sale – the Ten Commandments display on the monument might constitute government speech.

Rather than applying Free Speech Clause forum analysis to the case before it, the district court relied

primarily on *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), an Establishment Clause case alleging governmental endorsement of a religious display. Pet. App. 11b, 11a-12a. The district court concluded that the City's second land sale, to the Cole daughters, had effectively disassociated the City from the speech conveyed by the monument. *Id.* at 13b ("nothing on the property is in any way endorsed by or associated with Duchesne City," and nobody "could believe the city is presently sponsoring whatever expression is reflected on the plot owned by the Cole daughters"); *see also id.* at 14b.

In a subsequent order, however, the district court held that prior to the sale to the Cole daughters – and even after the transfer to the Lions Club – the City had not sufficiently distanced itself from the private speech contained on the Ten Commandments monument. Pet. 9; Pet. App. 4a. Based on this holding, the court found that the City had violated Summum's free speech rights during this period of time, but deemed the violation "technical" and awarded Summum $20 in nominal damages. *Id.*

2. Summum appealed the district court's determination concerning the second transfer to the Cole daughters. Summum argued that the City's display of the Ten Commandments monument created a traditional public forum in which it was entitled to equal access, and that the City's sale of the property was both invalid under state law and insufficient to close the forum. *See* Br. of Appellant 17-19.

The City cross-appealed the district court's finding that it violated Summum's Free Speech rights

subsequent to the transfer to the Lions Club. The City continued to argue that prior to its land sales, it had been operating only a nonpublic forum for the display of private monuments, in which it could impose reasonable, viewpoint-neutral restrictions. *See* Appellees' Answering Br. & Cross-Appellants' Opening Br. 22-23. *See, e.g.*, *id.* at 29 ("Roy Park was a nonpublic forum for purposes of erecting permanent private displays."); *id.* at 32 (defending the denial of Summum's request as a legitimate "distinction based on a speaker's identity"). After the sales, the City contended, it had effectively closed its forum to the display of all private monuments. Again, the City failed to argue that at any point in time the Ten Commandments monument represented government, rather than private, speech.[2]

In the decision of the court of appeals below, Chief Judge Tacha began by noting that Roy Park is a traditional public forum, so that the City's restrictions on speech in the park ("e.g., excluding Summum's Seven Aphorisms while allowing the Ten Commandments") are subject to strict scrutiny, and must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that interest." Pet. App. 8a (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)). Importantly, the City conceded that "it excluded Summum's speech based upon its subject

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[2] The City also filed a cross-appeal concerning the district court's refusal to grant summary judgment as to Summum's request for declaratory relief and nominal damages, as well as the court's denial of the City's motion for summary judgment for lack of standing. Both parties also appealed the attorneys' fee award.

matter and the speaker's identity," but did not assert a "compelling interest" for such discrimination and thus could not satisfy strict scrutiny. *Id.* 17a. Accordingly, if the plot of land containing the Ten Commandments monument remained part of the traditional public forum, the City could not justify excluding the proposed Summum monument under the applicable First Amendment standard. *Id.* 7a.

Thus, the "difficult question" in this case, the court stated, is "whether the small plot of land with the Ten Commandments monument remains part of a public forum (i.e., the city park) despite the City's efforts to sell it to a private party." *Id.* 9a. The Tenth Circuit concluded that the district court had erred in two respects in answering this critical question. First, it had failed to engage in the relevant forum analysis under the Free Speech Clause, relying instead on an Establishment Clause case to conclude that the City had adequately removed the Ten Commandments monument from its public forum and thus closed that forum to the display of private monuments. *Id.* 11a. Establishment Clause analysis is inapposite, the court of appeals explained, because "a determination of whether the government is endorsing religion is not the same as a determination of whether speech is occurring in a public forum." *Id.* 11a-12a.

The district court also erred, the Tenth Circuit held, in failing to address the threshold state-law question of "whether the property at issue is in fact privately owned," instead simply "assum[ing] that both sales were valid." *Id.* at 12a-13a. Under Utah law, a sale of public property must: 1) be conducted in good faith; and 2) be accompanied by adequate

consideration, defined as a "present benefit that reflects the fair market value" of the property. *Id.* 14a. Moreover, certain public property, including park property, may not be sold where it will continue to be used for the same purpose, and there must be documentation of the fairness of the transfer. *Id.* 15a.

Judged against these criteria, the Tenth Circuit found that the City's purported sale of the land to the Lions Club was "clearly invalid" because there was no documentation of the fairness of the transfer – i.e., there was no showing of adequate present consideration reflecting fair market value. *Id.* 15a-16a. Moreover, the mayor who executed the transfer was also the president of the local chapter of the Lions Club, raising "considerable doubt" that the transfer was made in good faith. *Id.* 16a. Thus, the sale was invalid under state law, and the land remained part of a traditional public forum at the time of Summum's request. As noted above, the City had not attempted to justify its concededly subject-matter and speaker-based exclusion of the proposed Summum monument under the strict scrutiny standard applicable in such fora.[3] Accordingly, the court concluded

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[3] Instead, the City asserted simply that "no constitutional right exists to erect a permanent structure on public property." Pet. App. 17a-18a. In response, the Tenth Circuit declined to "address that proposition in its most general application," because "in any event it does not apply when the government allows some groups to erect permanent displays, but denies other groups the same privilege." *Id.* 18a.

Indeed, the court "doubt[ed] the sincerity of the City's stated reason (and therefore its motive) in excluding Summum's speech" – i.e., Summum's alleged lack of community service – and noted that this reason, even if genuine, in the absence of

that "Summum's free speech rights were violated prior to the property's transfer to the Cole daughters." *Id.* 19a.

With respect to the subsequent sale of the park land to the Cole daughters, the Tenth Circuit held that the record was "insufficiently developed to determine whether the sale . . . is valid," *id.* 14a, and questioned whether it could survive scrutiny under state law, *id.* 20a. Because a "genuine issue of material fact exists concerning the validity of the City's transfer," the court reversed and instructed the district court to "first decide whether the sale meets the requirements of state law." *Id.* 21a. If the sale is valid, the court may then "decide the constitutional issue of the property's forum status." *Id.*

3. The City sought rehearing en banc, arguing that the panel erred in determining precisely what kind of speech forum was involved in the case, and that Roy Park was not a "traditional public forum for the display of permanent, private monuments." Defs.' Pet. for Reh'g En Banc 3. The City did not argue or even suggest in its rehearing petition that the Ten Commandments monument reflected government speech.

After consolidating the rehearing petition with the separate rehearing petition pending in *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007), the Tenth Circuit denied rehearing with three judges dissenting and Judge Tacha issuing a separate opinion responding to the dissents. *See* Pet. App. 1h. Those opinions, which focus primarily on

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"specific guidelines" would "confer[] too much discretion on city officials to exclude speech from a public forum." *Id.*

the government speech issue raised for the first time by petitioners in *Pleasant Grove* in their petition for rehearing en banc, are described in detail in our Brief in Opposition in that case. *See* BIO at 10-12.

REASONS FOR DENYING THE WRIT

1. Petitioners in this case, like petitioners in *Pleasant Grove*, seek this Court's review of a rule the Tenth Circuit has never actually announced or applied. According to petitioners, though this case does not implicate the issue directly, it was "litigated in the shadows" of prior Tenth Circuit precedent holding that "whenever a government accepts, erects, and displays a monument donated by a private entity, the government creates a speech forum for permanent monuments proffered by other private entities." Pet. 1. Petitioners are correct that such a rule would be "extraordinary." *Id.* But they are incorrect in asserting that the Tenth Circuit has ever adopted that blanket rule.

Instead, as explained in the *Pleasant Grove* Brief in Opposition, the Tenth Circuit has held only that once a governmental entity opens a traditional public forum to some form of private speech – here, the display of privately-donated monuments – it may not discriminate against other private speakers who wish to engage in the same form of speech, absent a compelling interest. BIO at 13-14, 19. And on the question of whether it is the government or a private party who is speaking when a privately-donated monument is involved, the Tenth Circuit has not, contrary to petitioners' suggestions, Pet. i, 6, held that a privately-donated monument displayed on government property necessarily constitutes "private

speech" for Free Speech Clause purposes. Rather, the Tenth Circuit – like other federal circuits – applies a context-specific, multi-factored test to determine the identity of the speaker in such cases. *See* BIO at 2-4, 23-24. And Circuit precedent makes clear that a privately-donated monument or display may in fact constitute "government speech" when the government acts in a way that effectively adopts that expression on the monument as its own. *Id.* at 2-4, 14-17. The decisions petitioners complain of – here and in *Pleasant Grove* – are no more than fact-specific applications of this narrow and context-sensitive rule. They do not implicate, and would not give this Court the opportunity to address, any broader issues concerning the line between private and government speech under the Free Speech Clause.

2. The purported conflicts of authority petitioners cite here to justify review are identical to those asserted in the *Pleasant Grove* petition, and they are illusory for the reasons explained in our Brief in Opposition in that case. *See* BIO, Part III. Neither the decision below nor any other Tenth Circuit precedent has concluded that all privately-donated monuments are *ipso facto* private speech, or that there is an unfettered constitutional right of private speakers to erect permanent private monuments on public property. *See id.* at 23. Likewise, no other circuit has endorsed the rule advanced by petitioners that *any* monument owned by the government and displayed on government land must necessarily constitute government speech. *See id.* at 23-28. Nor, finally, has any other court of appeals taken issue with the Tenth Circuit's unexceptional holding that the gov-

ernment may not discriminate among speakers in allowing access to a traditional public forum in the absence of a sufficiently compelling interest under the strict-scrutiny standard. *Id.* at 29-30.

3. There are additional reasons why this case would be a particularly poor vehicle for review of the questions petitioners have presented. The City here never, at *any* point in the litigation below, raised or even hinted at the issue at the heart of its certiorari petition, namely, whether the speech on the Ten Commandments monument should properly be viewed as government speech under the Free Speech Clause. Instead, as the Tenth Circuit opinion made clear, the critical issue below was the validity of the City's attempted land transfers under state law – an issue obviously not appropriate for this Court's review.

Indeed, the City actually conceded in the context of this litigation that Roy Park was a nonpublic forum for the display of private speech on permanent structures. *See supra*, at 4, 6. In its view, the transfer of the plot containing the Ten Commandments monument removed the monument from that forum and thus effectively closed the forum as to permanent structures. *Id.* But the City has never disputed that prior to the transfer the park was a forum open to *private* and permanent speech displays[4] – and, conversely, never suggested that the Ten Commandments monument in question constituted anything other than private speech.

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[4] Indeed, in offering Summum a plot of land for its monument if it performed some undefined amount of community service, the City confirmed that a forum for private speech remained open even *after* the transfer. *See supra*, at 3.

With respect to the land transfers themselves, the City's strategy in the courts below was wholly inimical to its current position. The very point of transferring the land on which the Ten Commandments monument stands was to *disassociate* the government from that speech, Pet. App. 9b – to make clear, as the District Court explained, that the City is *not* "sponsoring whatever expression is reflected on the plot owned by the Cole daughters." *Id.* 13b. That transfer, in other words, established that the monument was a *private* monument on *private* land. Having prevailed on that argument in the District Court, convincing that court that it had "effectively communicated to the public that it is not sponsoring the [monument] speech," *id.* 14b, the City cannot now decide for the first time that it would be better served by embracing the Ten Commandments monument as its own "government" speech.

4. Perhaps in acknowledgment that this case presents special problems as a vehicle for review, petitioners suggest that the Court might grant the petition in *Pleasant Grove* and hold the present petition pending resolution of that case. As we have explained, review in *Pleasant Grove* is both premature in light of the procedural posture of that case, and unnecessary due to the narrow, fact-based nature of the decision and the lack of any circuit conflict. *See generally* BIO, Parts I-IV. But even if review in that case were somehow warranted, there still would be no reason to hold this petition. Petitioners in this case never raised below the issue presented by their petition, and litigated their case in a manner wholly inconsistent with their eleventh-hour claim that the Ten Commandments monument should be viewed as

government speech. The petition should be denied outright.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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87

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IN THE

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DUCHESNE CITY, ET AL.,
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v.

SUMMUM, **a corporate sole and church,**
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY TO RESPONDENT'S STATEMENT OF THE CASE 3

ARGUMENT IN REPLY 3

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983) 5
Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997) 1
Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002) 1, 2
Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-665 (U.S. Nov. 20, 2007) 1

CONSTITUTIONS

U.S. Const. amend. I 1, 4

INTRODUCTION

The theory of Summum's litigation in the present case is indistinguishable from the theory of Summum's litigation in three other cases:[1] namely, a municipality displays on government grounds one or more monuments that private parties originally donated; such donated monuments supposedly qualify as **private** speech, despite government ownership and control of the displays; a First Amendment forum for private speech through permanent monuments therefore supposedly exists; and, Summum is thus supposedly constitutionally entitled, under forum analysis, to erect and display its own "Seven Aphorisms" monument on municipal property.

Summum has now prevailed on this faulty constitutional syllogism four times in the Tenth Circuit (the three cases cited *supra* note 1, plus the present matter). The Tenth Circuit, by an equally divided vote, failed to rectify en banc the error of these cases. Pet. App. 2h. The municipal defendants have therefore filed petitions for certiorari both in the *Pleasant Grove* case (No. 07-665) and in the present case.

Summum frankly embraces the Tenth Circuit's radical and aberrant jurisprudence. Equating

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[1] *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-665 (U.S. Nov. 20, 2007).

"privately donated monuments" with "private speech," Opp. at 10, Summum recites that the court below "only" held that "once a government entity opens a traditional public forum to . . . the display of privately-donated monuments[,] it may not discriminate against other private speakers who wish to engage in the same form of speech, absent a compelling interest," *id.* That, of course, is exactly how the city (in this case), the Pleasant Grove petitioners, and the dissenters in the Tenth Circuit described the matter.

Summum holds out the prospect that the Tenth Circuit may not **always** ("necessarily") hold donated monuments to be private speech. Opp. at 10-11. This is highly dubious, considering that the analysis the Tenth Circuit employs on this issue seems to guarantee a finding of "private speech" whenever a private entity donates a finished product. *See Summum v. City of Ogden*, 297 F.3d 995, 1004-05 (10th Cir. 2002). Be that as it may, what is clear is that in four out of four of these cases, the Tenth Circuit has so held. The prospect of a future exception arising would appear rather faint at this point.

The circuit splits, the conflicts with this Court's cases, and the profound practical difficulties the Summum cases have generated are discussed at length in prior filings in *Pleasant Grove* and in the case at bar. *See also* Br. of Virginia et al. at 8 ("As a practical matter, a particular [form] of government speech -- accepting a donation of property and then using that property to convey the government's message -- has been abolished"); Br. of American Legion et al. at 4 ("The precedent established by the Tenth Circuit lays the foundation for the destruction of all donated veterans memorials nationwide and chills the erection

of any future memorials").

In this Reply, the city focuses on features and arguments pertaining directly to this case.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent Summum states that three Tenth Circuit judges dissented from the denial of en banc rehearing. Opp. at 9. In fact, **six** judges voted to rehear this case en banc. Pet. App. 2h. Three of these six went even further, either penning or joining written dissenting opinions. Pet. App. 3h, 10h.

Summum claims that petitioner Duchesne City "has never taken any steps to adopt the message on the Ten Commandments monument as its own." Opp. at 2. This is misleading. The pertinent question is **not** whether the city has affirmatively adopted the **inscription** on the monument. *See* Reply to Br. in Opp., *Pleasant Grove City v. Summum*, No. 07-665 (U.S. Mar. 7, 2008) § I. Rather, the question is whether the **display** of the monument is a **city display**; on that score, the city has taken all the steps it needs. The city demonstrated dominion over the monument by the very act of its attempted transfer of the monument and its underlying plot of land. Pet. at 5, 6. Moreover, the city expressly disavowed any intent to open the park as a forum for the display of **private** monuments. Pet. App. 1k.

ARGUMENT IN REPLY

Much of Summum's Brief in Opposition in this case rehashes or cross-references arguments Summum has

made in opposition to certiorari in *Pleasant Grove*. The petitions filed in this case and in *Pleasant Grove*, and the Reply to Brief in Opposition in *Pleasant Grove*, have already met those arguments and need not be repeated here.

Summum argues that the present case poses only the question whether "the City's attempted land transfer was invalid under state law," Opp. at i. This assertion is badly inaccurate. While the court below did address state law issues, the case revolved around Summum's federal claim of First Amendment "equal access for monuments," *see* Pet. App. 6a-13a, 17a-19a, 21a (First Amendment forum analysis). If this Court rejects (as it should) the underpinnings of Summum's federal Free Speech claim -- namely, the erroneous Summum line of cases -- then Summum's federal claim necessarily fails, and the state property issues Summum points to become moot. (At that point, the district court could simply decline to exercise supplemental jurisdiction over Summum's remaining state constitutional claims. *See* Pet. App. 23a (consigning question of supplemental jurisdiction to the district court on remand).)

Summum concedes that the city, in the court below, pressed a challenge to the notion that the city park at issue was a First Amendment "public forum" for private monuments. Opp. at 9. This is plainly a federal constitutional issue. This issue can be resolved either by overturning the Tenth Circuit's erroneous forum analysis, *see* Pet. at i (Question Two), 11-12 (citing square conflict with this Court's cases), 17 (reiterating conflicts on forum issue), or by overturning the Tenth Circuit on the antecedent question whether a government-owned, government-controlled

monument in a government park is even "private speech" in the first place, *see* Pet. at i (Question One), 12-15 (describing disagreement among Tenth Circuit judges on this issue), 17 (referencing conflicts on this issue).

Summum says this case is a "particularly poor vehicle for review," Opp. at 12. But the present case represents an especially glaring example of the relentless consequences of the false constitutional syllogism the Tenth Circuit has adopted. In this case there was only **one** donated monument in the city park, Pet. App. 2a, yet the Tenth Circuit held that there was a public forum for monuments, Pet. App. 7a-8a, 17a. *Cf. Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 47 (1983) (selective access does not create a public forum). When the district court confronted Summum about the radical implications of its theory, Summum freely admitted as much.

> THE COURT: Wouldn't that just set up a chain reaction? Wouldn't that theoretically, at least, if not in practice cause all of the other entities that are not being equally treated to demand the same? You might not have a city park big enough.
>
> MR. BARNARD [Summum's counsel]: * * * I think, yes, that is a possibility.
>
> * * * That city park may well end up * * * looking like a cemetery with many, many monuments.

Tr. of Mot. Hearing, *Summum v. Duchesne City*, No. 2:03-CV-1049DB (D. Utah Jan. 7, 2004), at 8-9.

Summum contends that if this Court grants

review in *Pleasant Grove*, the Court should not even hold the present case pending disposition of *Pleasant Grove*. Opp. at 13. This makes little sense.

The *Pleasant Grove* and *Duchesne* cases were orally argued before the same Tenth Circuit panel on the same day, were decided on the same day, and were consolidated for consideration and decision of the petitions for rehearing en banc. The separate opinions released in connection with the consolidated denial of rehearing en banc addressed both cases, in plain recognition of the identical underlying legal rationale. The cities' petitions in this Court raise overlapping if not identical issues. In the Tenth Circuit, both cities challenged Summum's public-forum-for-private-monuments rationale.

This Court should decide the cases together, either by granting review in both, or by at least, if this Court first grants the petition in *Pleasant Grove*, holding the present petition pending disposition of that case.

CONCLUSION

This Court should either grant the petition outright, or, in the alternative -- should this Court first grant the petition in *Pleasant Grove City v. Summum*, No. 07-665 (U.S. petition for cert. filed Nov. 20, 2007) -- this Court should hold the present petition pending disposition of *Pleasant Grove* and then grant certiorari, vacate the decision below, and remand for further proceedings in light of *Pleasant Grove*.

Respectfully submitted,

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18

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In The
Supreme Court of the United States

DUCHESNE CITY, *et al.*,

Petitioners,

v.

SUMMUM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN LEGION; VETERANS OF FOREIGN WARS OF THE UNITED STATES; THE MILITARY ORDER OF THE PURPLE HEART, INC.; THE NON COMMISSIONED OFFICERS ASSOCIATION; VETERANS OF THE VIETNAM WAR, INC. & THE VETERANS COALITION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICI IN THIS CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. This case is important and the Court should grant the petition to save current and future veterans memorials from destruction 5

A. Veterans memorials are a fundamental element of American history and military culture and record those virtues we hold dear as a people 7

II. Allowing the destruction of any veterans memorial is a dishonor and betrayal toward all who have served and those serving even now 10

III. America's veterans memorials, honoring the service and sacrifice of millions, must be preserved 14

IV. Veterans memorials donated to the government for display is government speech 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Buono v. Kempthorne, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) 7, 17

Buono v. Kempthorne, 502 F.3d 1069 (9th Cir. 2007) 7, 17

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 16

Paulson v. Mt. Soledad Memorial Ass'n, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) 7, 17

Summum v. Duchesne City, 482 F.3d 1263 (10th Cir. 2007) 5

Summum v. Pleasant Grove City, 383 F.3d 1044 (10th Cir. 2007) 5, 6

United States v. American Library Ass'n, 539 U.S. 194 (2003) 16

INTEREST OF AMICI CURIAE[1]

The American Legion – The American Legion is a veterans and community service organization representing over 2.6 million members. The American Legion helps veterans survive economic hardship and secure government benefits. It works to promote social stability and well-being for those that have honorably served our nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Tenth Circuit has a detrimental impact on its ability to honor with veterans memorials those who have and do serve our nation's armed forces.

Veterans of Foreign Wars of the United States ("VFW") – The VFW is a veterans service organization representing over 2.3 million members. The VFW was instrumental in establishing the Veterans Administration, creating a GI Bill for the 20th century and developing the national cemetery system. The VFW also fights for the compensation of Vietnam veterans exposed to Agent Orange and

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[1] All counsel of record received notice of *amici's* intention to file this brief at least ten days before this brief was due. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

veterans diagnosed with "Gulf War Undiagnosed Illnesses." The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial and the Women in Military Service Memorial. This case is of great concern to the VFW as it threatens the very veterans memorials the VFW helped create and directly threatens the erection of like veterans memorials in the future.

The Military Order of the Purple Heart, Inc. – The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is, as well, awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. As its work, the Order conducts welfare, rehabilitation and service work for hospitalized and needy veterans and their families. The Order is greatly concerned with the outcome of this case as it directly affects the future of veterans memorials that honor those who, like themselves, literally shed their blood in this nation's service.

The Non Commissioned Officers Association ("NCOA") – The NCOA is a veterans service organization established to enhance and maintain the quality of life for enlisted personnel in all branches of the Armed Forces, National Guard and Reserves. It advocates in the federal legislature on issues that affect enlisted personnel and their families. It provides social improvement programs to help enlisted personnel thrive on active duty, on transition to civilian life and throughout retirement. The NCOA also aids often underpaid enlisted personnel in saving money through merchant program discounts. As the vast majority of veterans are or were enlisted personnel, the NCOA is greatly concerned with the adverse affect a court decision that threatens veterans memorials will have on those it serves.

Veterans of the Vietnam War, Inc., & The Veterans Coalition ("VVnW") – The VVnW is an international veterans organization dedicated to assisting U.S. veterans of all wars and all branches of military service through its programs and services. It strives to maintain, improve, preserve and defend the quality of life of all veterans and their families. VVnW provides transitional housing to homeless veterans as they attempt to reintegrate into society, offers psychological and medical care to needy veterans, and works to educate the public about the debilitating effects of Post Traumatic Stress Disorder and Gulf War Syndrome. VVnW opposes any court ruling that threatens veterans memorials. Such rulings only add to the difficulties and struggles

already burdening so many veterans as a result of their military service.

SUMMARY OF ARGUMENT

The precedent established by the Tenth Circuit lays the foundation for the destruction of all donated veterans memorials nationwide and chills the erection of any future memorials. From the United States Marine Corps War Memorial in Arlington, VA, to the Vietnam Veterans War Memorial on The Mall in Washington, DC, to the myriad Spirit of the American Doughboy WWI memorials like that in Ft. Smith, AR, this precedent will require all governments, from the smallest municipality to the Congress itself, to make an impossible decision: either fail to honor our veterans by any donated monument whatsoever, tear down those that currently exist, or allow a monument honoring our veterans and then, upon donation, erect on the same hallowed ground one that dishonors them.

The Tenth Circuit's ruling is flawed in its legal analysis, as demonstrated by Petitioner, and dangerous to veterans memorials in its practical effect. Failure on the part of this Court to decidedly reverse the Tenth Circuit will cause great harm and enshrine its opinion in law. Amici, therefore, representing millions of veterans nationwide, request this Court secure and protect the future of our nation's veterans

memorials by granting Petitioners writ of certiorari and reversing the Tenth Circuit.

ARGUMENT

I. This case is important and the Court should grant the petition to save current and future veterans memorials from destruction.

The American Legion filed an amicus curiae brief in *McCreary County v. ACLU* (Case No. 03-1693) warning this Court that veterans memorials across the country would perish if guidance was not issued to protect them. Amici are dismayed to see this prediction become a stark reality in the Tenth Circuit with a precedent laid for the circuits remaining.

The Tenth Circuit concluded that a monument donated to a government entity by a private party remains the donor's private speech. *See Summum v. Pleasant Grove City*, 383 F.3d 1044, 1048 n.2 (10th Cir. 2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1269, 1273-74 (10th Cir. 2007). It also concluded that the presence of a donated monument in a public area determines the area's forum and requires the acceptance of any other permanent monument, presumably until all green space has been filled. *See Pleasant Grove*, 383 F.3d at 1050 ("The permanent monuments in the city park therefore make up the relevant forum."); *Duchesne*, 383 F.3d at 1273-74.

This holding, flawed in its legal analysis, is devastating to veterans memorials. These memorials, erected to honor our veterans and the wars and battles in which they fought, account for a massive number of donated memorials erected in the public square. Under this precedent, any governmental entity, from the smallest municipality to the Congress itself, is presented an impossible choice: tear down its memorials donated to honor its veterans, requiring that none be erected in the future, or retain its memorials donated to honor its veterans and, upon request, accept and erect on the same grounds a monument donated to dishonor them.

The Tenth Circuit has authored a recipe for chaos. It has, as well, sealed the destruction of those privately donated veterans memorials within its jurisdiction and established a precedent that threatens those without. As Judge McConnell, joined by Judge Gorsuch, lamented in his dissent from the denial of rehearing, "[e]very park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter." *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting). Most towns and cities, out of necessity, will doubtless choose to tear down their veterans memorials rather than dishonor them or clutter their public areas.

Without appropriate action by this Court, then, the destruction of an untold number of veterans

memorials is sealed, and the rest fall deeper under the threatening shadow of a judiciary already proven hostile toward them. *See, e.g., Paulson v. Mt. Soledad Memorial Ass'n*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) (enjoining as unconstitutional a veterans memorial in San Diego, Ca.); *Buono v. Kempthorne*, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) (affirmed by *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)) (enjoining as unconstitutional a veterans memorial in the Mojave National Preserve).

A. Veterans memorials are a fundamental element of American history and military culture and record those virtues we hold dear as a people.

From the beginning, millions of Americans have given honorable service to this nation in its armed forces, often at cost of their lives. Beginning with the war against the Barbary Pirates of North Africa, the first formal war under our nation's Constitution,[2] this nation has commemorated the service and sacrifice of its veterans through privately donated memorials erected in the public square. Memorials to the

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[2] *See* The Tripoli Monument, United States Naval Academy, Annapolis, Md. The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search/ (enter the following into "Search" box: 75005835; then click "Tripoli Monument").

veterans of the War of 1812,[3] the Mexican War,[4] the Civil War,[5] the Spanish-American War,[6] World War I,[7] World War II,[8] the Korean War,[9] the Vietnam War[10] and the Gulf War[11] all bear witness to this. Following

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[3] *See, e.g.*, The Battle Monument in Baltimore, Md. The Historical Marker Database, www.hmdb.org (enter the following into "Search" box: battle monument Baltimore).

[4] *See, e.g.*, The Maryland Soldiers Monument of Baltimore, Md. The Descendants of Mexican War Veterans, www.dmwv.org/honoring/baltimore.htm.

[5] *See, e.g.*, The African American Civil War Memorial, Washington, D.C. The African American Civil War Memorial Freedom Foundation, www.afroamcivilwar.org (then click "The Memorial"); *see also* Telephone interview with representative of The African American Civil War Memorial Freedom Foundation, Washington, D.C., November 10, 2007.

[6] *See, e.g.*, The Spanish-American War Monument, Arlington National Cemetery, Arlington, Va. Arlington National Cemetery, www.arlingtoncemetery.org/visitor_information/Spanish-American_War.html.

[7] *See, e.g.*, The Spirit of the American Doughboy, erected in towns all across the United States. The Spirit of the American Doughboy, http://doughboy_lamp.tripod.com/id139.html.

[8] *See, e.g.*, The United States Marine Corps War Memorial, Arlington, Va. The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: VA000244; then click "The United States Marine Corps War Memorial").

[9] *See, e.g.*, The Korean War Memorial, Pittsburg, Penn., VFW Post 764, http://www.vfw764.org/koreanmem.htm.

[10] *See, e.g.*, The Vietnam Veterans Memorial, Washington, D.C., www.nps.gov/archive/vive/memorial/evolution.htm.

[11] *See, e.g.*, The Persian Gulf War Memorial Bust. The Smithsonian Institution Research Information System, http://

(Continued on following page)

each conflict, following each time we called upon our own to serve and to die, there arose afterward an instinctive need to commemorate that service in a very public and permanent manner. The result unwaveringly has been a lasting memorial of wood or stone or metal erected to honor and remember those who served and those who died.

Our veterans memorials have become ingrained in our national identity as deeply as any part of our culture could. When one thinks of Iwo Jima, among the first images that come to mind is that of five Marines and a Navy corpsman, battle weary and ragged, struggling to hoist the Colors atop a craggy, body strewn Mt. Suribachi, an image captured in bronze and black granite in a park in Arlington, Virginia. Thoughts of Vietnam unwaveringly turn to a long, spare granite wall standing on The Mall in Washington, D.C., a stark and unchanging roster of those who died in that war. In numerous towns and cities across our nation, World War I is forever tied to their own Spirit of the American Doughboy – life-size sculptures of a lone uniformed soldier of the Great War with arm raised, determinably striding forward. For many black Americans, reflections on the Civil War bring to mind the African American Civil War Memorial, the only national memorial to the black

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siris-collections.si.edu/search (enter the following into "Search" box: NY001479; then click "Persian Gulf War Memorial Bust").

veterans of the war in which the freedom of an entire people was won.

These memorials, honoring the dead and encouraging the living, use words like courage, valor, sacrifice, loyalty, bravery, faithfulness, hope, love, duty and honor. They record events and persons in which these virtues were seen and lived. They provide unchanging examples to young and old alike of what is good and right and honorable. They record the very history of this nation in metal and stone, providing those who view them yet another reason to be thankful for the land in which they find themselves and the Constitution under which they are governed.

Our veterans memorials are a living testimony to our very identity as a nation and as a people. Nothing more defines a nation than those times and causes it has considered worthy of the blood of its sons and daughters. These memorials commemorate those times and causes and the people who fought and bled for them and fight and bleed for them still. This case presents important questions, and if they remain unanswered, veterans memorials will perish.

II. Allowing the destruction of any veterans memorial is a dishonor and betrayal toward all who have served and those serving even now.

Consider the veterans memorials described in Section I-A, *supra*. While varied in form and effect, and erected in commemoration of different people

from different eras, all share two things in common: they stand in public parks in honor and remembrance of veterans from their respective wars, and they were donated by private parties for permanent display in the public square.[12]

Accordingly, the Tenth Circuit's analysis of the Constitution requires that upon donation and alongside the Iwo Jima memorial, a monument to the benevolence of the prison guards of the Bataan Death March be erected, as well as one to the meritorious contributions of the kamikaze. Upon donation, per

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[12] The United States Marine Corps Memorial (i.e., the Iwo Jima monument), located in a public park in Arlington, Va., was donated by individual Marines and friends of the Marine Corp. *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: VA000244; then click "The United States Marine Corps War Memorial"). The Vietnam Veterans Memorial (i.e., The Wall), erected on The Mall in Washington, D.C., was donated by contributions from more than 275,000 individuals. *See* The Vietnam Veterans Memorial, Washington, D.C., www.nps.gov/archive/vive/memorial/evolution.htm. A great number of Doughboys erected in public parks across the country were donated to their respective towns by private organizations and civic groups. *See* http://members.tripod.com/doughboy_lamp/earlspages/id63.html (click on Anniston, AL, Birmingham, AL, Ft. Smith, AR, etc.). And the African American Civil War Memorial, erected in a public plaza in the heart of Washington, D.C.'s Shaw neighborhood, was donated through private contributions to the Freedom Foundation of the same name. *See* The African American Civil War Memorial Freedom Foundation, www.afroamcivilwar.org (then click "The Memorial"); *see also* Telephone interview with representative of The African American Civil War Memorial Freedom Foundation, Washington, D.C., November 10, 2007.

the Tenth Circuit, it is only constitutional that a large bust of Ho Chi Minh, renowned purveyor of democratic principles and human rights, be placed on The Mall along with the Vietnam Veterans War Memorial. Upon donation, the towns across the country with World War I Doughboys must also erect a monument donated to honor the leaders of the Central Powers. And the Tenth Circuit would find that acceptance of the donated African American Civil War Memorial requires acceptance of a donated alabaster sculpture of a hooded man in white robes bearing the title of grand dragon.

Battery Park on Manhattan Island, New York, is replete with donated memorials, veterans and otherwise. It is also the current home of The Sphere and Eternal Flame, memorials to the fallen of September 11, 2001. According to the Tenth Circuit, the people of New York should also be required to accept and erect, upon the same ground, a monument donated to extol the virtues of al-Qaida and the vision of its leaders.

Likewise the U.S. Soldiers Monument in Shelby, Michigan,[13] the Spanish-American War Monument in Arlington National Cemetery,[14] the Maryland Soldiers

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[13] *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: MI000301; then click "U.S. Soldiers Monument").

[14] *See* Arlington National Cemetery, www.arlingtoncemetery.org/visitor_information/Spanish-American_War.html.

Monument in Baltimore, Maryland,[15] the countless veterans memorials donated and erected in the public squares of countless towns by The American Legion, Veterans of Foreign Wars, the Fraternal Order of Eagles, etc. – even the Statue of Liberty in New York Harbor – all are privately donated memorials erected in the public square. According to the Tenth Circuit, each of the areas housing these memorials could now be considered public fora in which any donated monument espousing protected speech can and must be displayed regardless of viewpoint.

Exploration and intellectual analysis of the bounds of our rights and liberties under the Constitution is good and necessary. Without it, our rights and liberties would stagnate. The implications of this ruling, however, are astounding: if some are honored, their dishonor must be permitted as well. And all must be honored or none may be honored. This, of course, defeats the very purpose for the act of *honoring*, which is to set apart as special and worthy of consideration a particular person or act or idea. If all must be similarly set apart, then the act of honoring loses its meaning. The Court should grant the petition to preserve veterans memorials now and for the future.

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[15] *See* The Descendants of Mexican War Veterans, www.dmwv.org/honoring/baltimore.htm.

III. America's veterans memorials, honoring the service and sacrifice of millions, must be preserved.

The destruction and chilling of our veterans memorials is not a viable option. What effect would the court sanctioned destruction of veterans memorials do to the soldier who even now is patrolling the streets of Baghdad with death at every street corner and behind every door? What would a headline like "Court strikes down veterans memorials" do to the legless Marine in Walter Reed struggling to make sense of his injuries and put his life back together? What would it mean to the homeless veteran on the streets of Chicago? What effect would it have on the remaining veterans who survived Pearl Harbor and suffer nightmares even now?

Our veterans memorials serve as unchanging reminders of who we are as a nation and where we have been. How else should this be done? In forgotten books gathering dust on hidden shelves of forgotten libraries? In motion pictures once watched and put on the shelf and out of mind? Public memorials are among the most powerful tools of remembrance available to the modern world. Each time we see them, our veterans memorials force us to remember, if only fleetingly and only for an instant, that there were those who held the line, that there were those who answered the call, that there were those who rose to the task at peril of their lives to give themselves to something they deemed worthy of their life. They force us to remember that the security and

prosperity of this nation did not come without a price, both high and dear, and that its birth and continued survival has been hard fought and hard won.

Our veterans memorials force us to remember. If we fail to remember, we forget. And if we forget the men and the women and the struggles and the virtues our veterans memorials commemorate, what does that say about us as a people? And what effect will it have in the future when we call on our own to don the uniform once more and go in harm's way? The Court should grant the petition to preserve our veterans memorials, which stand the most to lose in the wake of the Tenth Circuit's ruling.

IV. Veterans memorials donated to the government for display is government speech.

Veterans organizations, the typical private donors of veterans memorials, do not seek to speak on their own behalf when donating a veterans memorial. Instead, organizations such as amici intend to assist and support the government's role of honoring those who served our nation so well. The government never turns a blind eye during the donation process. On the contrary, government officials are very involved in the development and design of the memorials and must approve the dimensions, design and content of the memorial. This very selection of memorials for the governmental display is itself the exercise of governmental authority, and the government ultimately takes ownership and control of the memorial donated

by the organization. *See, e.g.*, *United States v. American Library Ass'n*, 539 U.S. 194, 208 (2003) (plurality); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998).

Veterans take an oath upon entering service to uphold the Constitution of the United States. It is the obligation of the United States and their political subdivisions to honor the sacrifice of those who preserved them. Veterans organizations and individuals simply assist the government in fulfilling its role, its duty, to honor those who preserved our freedom and our nation. Thus, the thousands and thousands of veterans memorials across the country, found in almost every city or county, are properly viewed as government speech for the purpose of honoring the sacrifice of those who preserved us a nation.

CONCLUSION

This Court should preserve our nation's veterans memorials by granting the writ of certiorari and reversing the Tenth Circuit. Millions of veterans, represented by amici, implore it to do so. This Court may, without question, choose another course. It has the power to allow the Tenth Circuit's ruling to stand and thus the veterans memorials to fall. But if it

does, if after repeated warnings[16] and in the face of certain destruction this Court again fails to render our veterans memorials the protection they deserve, this nation will walk that course with heads bowed, not in reverence, but in disgrace, ingratitude and shame. The Petition should be granted.

Respectfully submitted,

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[16] The American Legion filed an *amicus curiae* brief in *McCreary County v. ACLU* (Case No. 03-1693) warning this Court that veterans memorials across the country would perish if guidance was not issued to protect them. *See also Paulson v. Mt. Soledad Memorial Ass'n*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) (enjoining as unconstitutional a veterans memorial in San Diego, Ca.); *Buono v. Kempthorne*, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) (affirmed by *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)) (enjoining as unconstitutional a veterans memorial in the Mojave National Preserve).

(3)

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In The
Supreme Court of the United States

DUCHESNE CITY, CLINTON PARK, Mayor, YORDYS NELSON, NANCY WAGER, PAUL TANNER, DARWIN McKEE, and JEANNIE MECHAM, City Council Members,

Petitioners,

v.

SUMMUM, a corporate sole and church,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, EIGHT OTHER STATES, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

The States' Amici Brief in support of the Petition addresses the following questions:

1. When government accepts a donation of property and then uses the property for expressive purposes, is the expression considered government speech?

2. If government accepts a donation of property and then installs that property in a public park, does the government create a public forum for the installation of structures?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
REASONS FOR GRANTING THE PETITION	3
I. THERE IS A CONFLICT AMONG THE CIRCUITS	4
A. The Circuits Are Divided on Whether a Donation of Property Results in Government Speech or Private Speech by the Donor	4
B. The Circuits Are Divided on Whether Public Parks Are a Public Forum for the Erection of Monuments	6
II. THE DECISION BELOW UNDERMINES THE STATES' ABILITY TO ENGAGE IN GOVERNMENT SPEECH	7
III. THE DECISION BELOW HAS SIGNIFICANT IMPLICATIONS BEYOND PUBLIC PARKS	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

ACLU Nebraska Found. v. City of Plattsmouth, 419 F.3d 772 (8th Cir. 2005) 5

ACLU v. Schundler, 104 F.3d 1435 (3rd Cir. 1997) 5

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 10

Board of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217 (2000) 1

Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) 8

Freedom from Religion Found. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000) 5

Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) 6

Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) 7

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) 7

Kaplan v. City of Burlington, 891 F.2d 1024 (2nd Cir. 1989) 6

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 7

TABLE OF AUTHORITIES – Continued

Page

Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341 (7th Cir. 1990) 6

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 1, 7

PETA v. Gittens, 414 F.3d 23 (D.C. Cir. 2005) 3, 5

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995) 1, 7

Rust v. Sullivan, 500 U.S. 173 (1991) 1, 3

Serra v. United States Gen. Servs. Admin., 847 F.2d 1045 (2nd Cir. 1988) 3, 5

Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997) 4

Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002) 4

Summum v. Pleasant Grove City, 482 F.3d 1014 (10th Cir. 2007), *petition for cert. filed* (U.S. Nov. 20, 2007) (No. 07-665) 4

Tucker v. City of Fairfield, 398 F.3d 457 (6th Cir. 2005) 6

United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. American Library Ass'n, Inc., 539 U.S. 194 (2003) 1

Wooley v. Maynard, 430 U.S. 705 (1977) 3

OTHER AUTHORITIES

http://www.state.sd.us/state/capitol/capitol/tour/bronze.htm. 10

http://www.vaag.com/PRESS_RELEASES/News Archive/052407_Wall.html. 10

INTEREST OF AMICI[1]

The States' interest is clear – preserving the sovereign authority of the States and their political subdivisions to engage in *government* speech. If it is inevitable that government will "adopt and pursue programs" that "are contrary to the profound beliefs and sincere convictions of some of its citizens," it is equally "inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Board of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000). When the government speaks, "different principles" control. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995). Government speech takes many forms including defense of its own "values," *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), determinations of excellence, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998), and a public library's "traditional role in identifying suitable and worthwhile material," *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 208 (2003). Although most government speech will involve the expenditure of public funds, there are instances when government speaks by accepting a donation of personal, real, or intellectual property from private interests and then using that property to perpetuate the government's message. The use of property for

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file.

government expression is constitutionally indistinguishable from the use of public funds for government expression. If government can spend money to purchase newspaper and radio advertisements saying "immunize your child," government can accept a donation of a privately financed billboard that reads "immunize your child." Moreover, having advocated the message of childhood immunization, government can refuse the donation of a billboard that says, "immunization is a government conspiracy."

The Tenth Circuit's decision ignores these fundamental principles of government speech. It limits the ability of government – at all levels – to use or decline donated property as a means of government expression.[2] Under the lower court's reasoning, if government accepts a donation of property as a means of facilitating its own expression, it must accept all similar donations – even though the other donations convey a message that is tangential or even contradictory to the message that government wishes to convey. As Judge McConnell noted, governments "must either remove the war memorials or brace themselves for an influx of clutter." *Pet. App.* 10f (McConnell, J., joined by Gorsuch, J., dissenting from the denial of rehearing *en banc*.).

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[2] Presumably, the same rationale would apply if the donor sold the property to the government for less than fair market value. Thus, the rule cannot be avoided by selling the property for some nominal amount.

The Constitution does not compel such a result. To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it advances its own agenda "would render numerous Government programs constitutionally suspect." *Rust*, 500 U.S. at 194. "Consequently, the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen."[3] *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1048-49 (2nd Cir. 1988). "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee." *PETA v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons. First, there is a conflict among the Circuits. Second, the decision below undermines the States' ability to engage in government speech. Third, the Tenth Circuit's decision has implications far beyond the public parks.

[3] *See also Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (State may express official view of state history, but may not force individuals to do so.); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973) (act forbidding federal employees from engaging in political activity does not violate First Amendment).

I. THERE IS A CONFLICT AMONG THE CIRCUITS.

The Tenth Circuit decision conflicts with the decisions of other Circuits in two ways. First, the Circuits are divided on whether a donation of property results in government speech or private speech by the donor. Second, the Circuits are divided on whether public parks are a public forum for the erection of monuments.

A. The Circuits Are Divided on Whether a Donation of Property Results in Government Speech or Private Speech by the Donor.

The Circuits are divided on whether a donation of property results in government speech or private speech by the donor. In the Tenth Circuit, when government accepts a donation of property, any speech that subsequently results is speech by the private donor, not speech by the government. *Pet. App.* 7a-9a, 17a-19a.[4] Moreover, if multiple donors wish to convey property, government has no discretion to accept or reject particular pieces of property.

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[4] *See also Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048 n.2 (10th Cir. 2007), *petition for cert. filed* (U.S. Nov. 20, 2007) (No. 07-665); *Summum v. City of Ogden*, 297 F.3d 995, 1003-06 (10th Cir. 2002); *Summum v. Callaghan*, 130 F.3d 906, 919 & n.19 (10th Cir. 1997).

In sharp contrast, other Circuits have concluded that, when government accepts a donation of property, any speech that subsequently results is government speech. *See ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 774, 778 (8th Cir. 2005) (*en banc*) (implicitly assuming that a city's acceptance of a privately donated monument in public park resulted in government speech). When property is transferred from a private party to the government, "the effect of formal transfer of legal title to property [is] a transfer of imputed expression. . . ." *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). If a work of art "is entirely owned by the Government and is displayed on Government property," "the speaker is the . . . Government." *Serra*, 847 U.S. at 1049. Similarly, a religious display "owned and displayed by city government on city government property" is "government speech." *ACLU v. Schundler*, 104 F.3d 1435, 1444 (3rd Cir. 1997). Furthermore, when government chooses to accept some donations, but to reject others, it is engaging in government speech. *PETA*, 414 F.3d at 28-29. Thus, in the D.C. Circuit, the government may choose which privately donated sculptures to install in a public park. *Id.* at 29.

B. The Circuits Are Divided on Whether Public Parks Are a Public Forum for the Erection of Monuments.

The Circuits also are divided on whether public parks are a public forum for the erection of monuments. The Tenth Circuit found that, by allowing the erection of a single monument in a public park, the government creates a public forum for the erection of monuments. *Pet. App.* 9a-11a. Thus, unless the government bans "all permanent displays," *Pet. App.* 18a, it must allow private parties to erect monuments whenever they wish.

Other Circuits have reached the opposite conclusion. *See Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2nd Cir. 1989) (Local government is not required to display a privately funded menorah in a public park.). "There is no private constitutional right to erect a structure on public property." *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (*en banc*). "If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990). "Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved." *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005).

II. THE DECISION BELOW UNDERMINES THE STATES' ABILITY TO ENGAGE IN GOVERNMENT SPEECH.

Even if there were not a clear, deep, and mature conflict among the Circuits, review by this Court would still be warranted to correct the Tenth Circuit. The decision below undermines the States' ability to engage in government speech.

There is a fundamental difference between private speech that utilizes government resources such as property or money and government speech that advances the government agenda. *Finley*, 524 U.S. at 586. If government makes its property or funds available for private expression, the First Amendment prohibits viewpoint discrimination. *See Rosenberger*, 515 U.S. at 837 (public funds for student groups); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993) (use of a publicly owned auditorium).[5] In contrast, the expenditure of public funds for government speech generally does not implicate the First Amendment. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005). "Simply because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist."

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[5] *Cf. Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148 n.1 (1946) (Second class mailing privileges available to all newspapers and other periodicals).

Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).

The decision below blurs the fundamental distinction between private speech using government resources and government speech. First, under the reasoning of the court of appeals, *all* donations of property to the government that result in expression are considered *private* speech and, thus, implicate the First Amendment. As a practical matter, a particular of government speech – accepting a donation of property and then using that property to convey the government's message – has been abolished. Although government may still pursue other modes of communication, the closure of one mode makes the government expression more difficult.

Second, under the reasoning below, if donated property is erected in a public park, that park is transformed into a public forum where other private parties may erect donated property with expressive attributes. As a practical matter, this means that government can no longer use its own parks to convey its message. While government remains free to speak in other places, the loss of the public park as a venue for government speech makes communication more difficult.

Furthermore, while government speech is inhibited by the Tenth Circuit's decision, there is no reason to believe that private speech will be expanded. As a practical matter, government will respond to the decision by refusing to accept

donations of property. Moreover, faced with a choice of allowing all monuments in public parks or allowing none, many – if not most – governments will opt for none. Thus, the long-term effect of the decision may well be to inhibit private speech. Surely, the Constitution does not require a result that inhibits government speech while not promoting – and possibly undermining – private speech.

III. THE DECISION BELOW HAS SIGNIFICANT IMPLICATIONS BEYOND PUBLIC PARKS.

The implications of the lower court's decision for public parks are obvious. George Washington must stand near Benedict Arnold. Union Generals must be accompanied by their Confederate counterparts. A Holocaust Memorial must be alongside a monument to the Ottoman Empire's Armenian Genocide or the British atrocities during the Boer War, or, for that matter, a monument to honor Adolf Hitler. The applications to public parks alone are sufficient to warrant this Court's review.

Yet, nothing in the Tenth Circuit's opinion limits its rationale to public parks. Its logic extends to any governmental decision that involves the acceptance of property where some form of expression results. Most obviously, the decision applies to government's decisions regarding the contents and décor of government buildings. Since Virginia's Pocahontas

State Office Building[6] contains a privately funded "Wall of Honor" commemorating those Virginians who have died in the War on Terror, it must also include a "Wall of Shame" protesting the War or celebrating the supposed virtues of the Terrorists.[7] Although South Dakota's Capitol Rotunda contains privately donated sculptures of Wisdom, Vision, Courage, and Integrity, the Tenth Circuit would mandate inclusion of other sculptures honoring Stupidity, Cowardice, and Dishonesty.[8]

Less obviously, the mandate extends to all decisions where government accepts property and some sort of expression results. Thus, if a public museum accepts a donation of a painting, it must accept all donations of paintings – even if it regards a painting as inferior art, distasteful, or simply inappropriate for the museum's overall purpose. Similarly, if a public university library accepts a donation of a book, it must accept all donations of books. *Cf. Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (libraries have broad discretion in determining what books to add to their collections). Conceivably, acceptance of a private party donation of laboratory

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[6] Virginia names its State Office Buildings after prominent Virginians including Jefferson, Madison, and Monroe.

[7] For a description of the "Wall of Honor," see http://www.vaag.com/PRESS_RELEASES/NewsArchive/052407_Wall.html.

[8] For information and images of the sculptures, see http://www.state.sd.us/state/capitol/capitol/tour/bronze.htm.

equipment, computers, or curricular materials means that the government may never refuse a donation. In time, government will be overwhelmed with mediocre art, unwanted books, and useless equipment. The only way for the government to avoid becoming a "pack rat" is to refuse all donations of art and books.

CONCLUSION

For the reasons stated above, in the Petition itself, and in the other amici briefs supporting the Petitioners, the Petition for Certiorari should be **GRANTED**.

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